80-1781

Office-Supreme Court, U.S.
FILED
APR 24 1981
ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, and the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado,

PETITIONERS,

v.

MALCOLM BALDRIDGE, in his official capacity as the Secretary of the U.S. Department of Commerce; DANIEL B. LEVINE, in his official capacity as the Acting Director of the United States Bureau of the Census; WILLIAM ADAMS, in his official capacity as the Acting Regional Director of the United States Bureau of the Census; the U.S. DEPARTMENT OF COMMERCE, one of the lawfully constituted departments of the United States of America; and the UNITED STATES BUREAU OF THE CENSUS one of the lawfully constituted agencies of the U.S. Department of Commerce,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAX P. ZALL
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Counsel of Record for Petitioners

GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Attorney for Petitioners

QUESTIONS PRESENTED

1. Are the addresses of living units in the City and County of Denver deemed by the Census Bureau to be vacant on April 1, 1980 protected by the privilege of confidentiality of 13 U.S.C. §9?

2. Did the Order of the District Court, with its protective provisions, violate the privilege of confidentiality of 13 U.S.C. §9?

3. Does the interpretation and application of the protection of the privilege of confidentiality afforded by 13 U.S.C. §9 to the facts in this case by the Court of Appeals violate the Constitutional requirements of equal representation and one person-one vote?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(I)
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Facts	3
B. Decisions Below	6
REASONS FOR GRANTING REVIEW	8
ARGUMENT	9
The interpretation and application of the privilege of confidentiality of 13 U.S.C. §9 to the facts in this case by the Court of Appeals violates the constitutional requirements of equal representation and one person-one vote	9
The addresses of living units in the City deemed to be vacant on April 1, 1980 by the Census Bureau are not protected by the privilege of confidentiality of Section 9 of the Census Act	12
The order of the District Court did not violate the privilege	13
CONCLUSION	14
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962)	9
Baldridge v. *Shapiro*, S.Ct. No. 80-1436	9
Carey v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 29, 1980), appeal pending, No. 81-6042 (2nd Cir.)	9
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969)	9, 10

Prigg v. *The Commonwealth of Pennsylvania*, 41 U.S. 539 (1842) 10
Reynolds v. *Sims*, 377 U.S. 533 (1964) 10
Seymour v. *Barabba*, 559 F.2d 806 (1977) 13
Shapiro v. *Klutznick*, No. 80-2638 (D.N.J. Aug. 27, 1980), No. 80-2466 (3rd Cir. Dec. 1, 1980), cert. pending, No. 80-1436, (U.S.S.Ct.) 9
Wells v. *Rockerfeller*, 394 U.S. 542 (1969) 9
Westberry v. *Sanders*, 376 U.S. 1 (1964) 9

Constitutions:
U.S. Constitution, Article I, Section 2 6
Colorado Constitution, Article V, Sections 44 through 48..... 10

Statutes:
Census Act (Title 13, U.S.C.) 2, 11, 12
Section 9 ..... 2, 7, 14
Section 9(a)(1) 2, 12
Section 9(a)(2) 3, 13
Section 9(a)(3) 3, 13

Jurisdictional Statutes:
5 U.S.C. 552 6
28 U.S.C. 1292(b) 8
28 U.S.C. 1254 (1)..... 2
28 U.S.C. 1331 6
28 U.S.C. 1337 6
28 U.S.C. 1361 6
28 U.S.C. 2201 6
28 U.S.C. 2202 6

Colorado Revised Statutes.....
2-1-101 C.R.S. 1973, *et seq.*, as amended ... 10
2-2-101 C.R.S. 1973, *et seq.*, as amended ... 10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No.

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, and the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado,

PETITIONERS,

v.

MALCOLM BALDRIDGE, in his official capacity as the Secretary of the U.S. Department of Commerce; DANIEL B. LEVINE, in his official capacity as the Acting Director of the United States Bureau of the Census; WILLIAM ADAMS, in his official capacity as the Acting Regional Director of the United States Bureau of the Census; the U.S. DEPARTMENT OF COMMERCE, one of the lawfully constituted departments of the United States of America; and the UNITED STATES BUREAU OF THE CENSUS, one of the lawfully constituted agencies of the U.S. Department of Commerce,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, William H. McNichols, Jr., individually and in his official capacity as Mayor of the City and County of Denver, and the City and County of Denver, a municipal corporation of the State of Colorado, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 17, 1981.

OPINIONS BELOW

The order of the United States District Court for the District of Colorado (Carrigan, J.) is not officially reported but appears at page A-1. The opinion of Judge McKay for the Tenth Circuit Court of Appeals, not yet officially reported, appears at page A-7. The captions in those proceedings included Philip M. Klutznick as the Secretary of the U.S. Department of Commerce and Vincent P. Barabba as the Director of the U.S. Bureau of the Census, and Leo Schilling as the Regional Director of the U.S. Bureau of the Census; each of whom has been succeeded in office and has been replaced in the caption in This Court by Malcolm Baldridge, Daniel B. Levine and William Adams, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1981 and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 9 of the Census Act, 13 U.S.C. § 9 reads as follows:

> § 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

STATEMENT OF THE CASE

A. Facts

In this action William H. McNichols, Jr., as an individual citizen and elector, and as the Mayor, of the City and County of Denver,

and the City and County of Denver complain that the count of the population within Denver is inaccurate and has been inaccurately reported by the Census Bureau which shall cause the improper apportionment of Congressional representation and apportionment of Colorado State senators and representatives and deprive the City and County of certain statutory rights. Petitioners claim that the government did not count all of the population in Denver and particularly, those persons who should have been counted and who reside in living units which the Census Bureau deemed to be vacant on Census Day.

In 1970 the Census Bureau certified that the population in the City was 514,800 people. The population for Denver has been consistently estimated and projected during the 1970's by the Denver Regional Council of Governments as being above 520,000 persons. The Denver Regional Council of Governments estimate of Denver's population for 1977 was 522,100; for 1978, 522,500; for 1979, 521,700; and for 1980, 521,300. The Denver Regional Council of Governments has been making estimates and projections for population in the Denver Metropolitan area for 25 years.

The City submits that its population is over 500,000 and bases its claim on the number of water and sewer taps permitted, the number of telephones installed, information contained in its Building Department records and its assessment records and information obtained from the Office of the Governor of the State of Colorado, the Denver Board of

Realtors, the U.S. Post Office, and the Denver Regional Council of Governments.

Although the Census Bureau's preliminary figures were increased from 455,000 to 491,651, the City registered its protest and made its challenge to the figures of the Census Bureau upon its receipt of these preliminary figures. Officials of the Census Bureau checked the status of occupancy of a few particular buildings which the City claimed had fewer vacancies than were shown by the data from the Census Bureau and confirmed to the City the number of vacancies in those particular buildings located in the City at the request of the City.

The City commenced and conducted a population and vacancy survey of its own which included surveying approximately one-third of the living units in the City which were selected for examination due to the relatively high vacancy rate assigned to those areas by the Bureau. The results of the population and vacancy survey of the City showed a 5.3% vacancy rate as opposed to the 9.6% vacancy rate of the Bureau; and that the Census Bureau indicated 46% more vacant units than did the survey of the City.

The opinion of the Assessor of the City is that the vacancy rate for the City on Census Day was 3%; and the opinion of one of the appraisers of the City was that the vacancy rate on Census Day was from 3% to 4%. The Census Bureau wrote off too many living units in the City as vacant.

The statistics and data of the Census Bureau indicate that the average number of persons residing in a living unit in the City is

2.2 persons. The Regional Administrator of the Bureau of the Census admitted at the hearing on the City's application for preliminary injunction that not every person in the City was counted by the Census Bureau in the 1980 Decennial Census.

B. Decisions Below

The jurisdiction of the District Court for the District of Colorado was invoked due to the existence of a federal question under 28 U.S.C. § 1331, 1337, 1361, 2201 and 2202, a claim under the Freedom of Information Act, 5 U.S.C. 552, and a claim concerning violation of rights guaranteed by Article I, Section 2, Clause 3 of the Constitution of the United States of America.

Petitioners initially sought a temporary restraining order keeping open the Census Bureau's Denver offices. The parties agreed, however, that the offices could close so long as the Bureau kept its updated master address list, known as the Follow-up Address Registers (FARs), in Denver during this lawsuit. Petitioners then sought a preliminary injunction requiring, in essence, that the Bureau cooperate with the City in verifying the vacancy data. The court did not rule on the preliminary injunction, and still has not, but focused instead on the question whether Petitioners should have access to the vacancy information in the FARs to check the Bureau's vacancy tabulations. After initially seeking the vacancy information in the FARs under the Freedom of Information Act, Petitioners also sought production of the documents under the federal discovery rules.

The Bureau maintained that the information in the FARs must remain confidential pursuant to a disclosure bar contained in 13 U.S.C. 9.

The district court found that:

(1) There is no way that the actual effect of the definitional differences between the methodologies of the City and the government, if any there be, can be verified and evaluated unless the City can discover the vacancy information in the FARs, which tell the City which dwellings the Bureau counted as vacant as of April 1, 1980*;

(2) To deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determinations concerning the 1980 Decennial Census;

(3) Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure of 500,000 is a threshold of city size affecting both the state and federal grants; and

(4) The vacancies in dispute could make up the difference between the 491,000 which the Bureau proposes and the 500,000 which Denver claims is its population at a minimum.

---

*The government disregarded the results of the City's survey of one-third of the City which showed a substantially lower vacancy rate than that of the Bureau on the basis that the definitions and methodologies used by the City were incorrect and different from those of the Bureau and invalid. Due to the subjectivity of these matters, the only place to start comparison must be the data leading to the conclusions and the results.

The district court concluded that the purposes of Section 9 of Title 13, U.S.C. can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

On this rationale the court entered a multipart discovery order:

(1) The government must produce the FARs, or alternatively, a list of vacant addresses culled from the FARs;
(2) all names and other identifying references must be deleted;
(3) all City employees given access to the information must take the same secrecy oath as Census Bureau employees;
(4) the information obtained may be used only to seek adjustment of the census; and
(5) Census Bureau officials may at their option accompany City employees seeking to verify the Census Bureau's vacancy data.

The district court certified its order for immediate appeal under 28 U.S.C. § 1292(b) and stayed its order temporarily.

The Court of Appeals stayed the discovery order of the District Court and granted permission to take the interlocutory appeal and assumed jurisdiction under 28 U.S.C. § 1292(b). The Court of Appeals reversed the discovery order, holding that Congress had made the information sought by Petitioners immune from discovery and that there can be no judicial exception made to that immunity.

REASONS FOR GRANTING REVIEW

1. The issues in this case are important questions of federal statutory and constitutional law which

have not previously been, but should be, settled by This Court.

2. There exists a conflict between the decision of the Tenth Circuit Court of Appeals in this case and the decision of the Third Circuit Court of Appeals in the case of *Shapiro* v. *Klutznick*, captioned in This Court as *Baldridge* v. *Shapiro* and docketed as Case No. 80-1436 for which certiorari has already been petitioned by the federal defendants. The Second Circuit Court of Appeals denied permission to the federal defendants to take an interlocutory appeal of a similar discovery order of the District Court for the Southern District of New York in *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 29, 1980), appeal pending No. 81-6042 (2nd Cir.).

ARGUMENT

THE INTERPRETATION AND APPLICATION OF THE PRIVILEGE OF CONFIDENTIALITY OF 13 U.S.C. §9 TO THE FACTS IN THIS CASE BY THE COURT OF APPEALS VIOLATES THE CONSTITUTIONAL REQUIREMENTS OF EQUAL REPRESENTATION AND ONE MAN-ONE VOTE

This Court has held that Article I, Section 2, of the Constitution means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Westberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal." *id.* at 18. See also *Wells* v. *Rockerfeller*, 394 U.S. 542 (1969); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

Petitioners allege an impairment of their "right to a vote free of arbitrary impairment," *Baker* v. *Carr*

369 U.S. 186, 208 (1962), in that an inaccurate census count of the population of the City and County of Denver shall result in the improper apportionment of Congressional and state legislative representation. The states must, as a practical matter, rely on the federal census data for the purposes of congressional redistricting. *Kirkpatrick* v. *Preisler, supra; Prigg* v. *The Commonwealth of Pennsylvania,* 41 U.S. 539 (1842). The Constitution and statutes of the State of Colorado require that census data be used in districting not only for congressional representation but also the representation of both houses of the State General Assembly. Colo. Constit. Art. V, Sect. 44 through 48; 2-1-101 C.R.S. 1973, *et seq.,* as amended, and 2-2-101 C.R.S. 1973, *et seq.,* as amended.

Petitioners recognize that mathematical exactness or precision is "hardly a workable constitutional requirement," *Reynolds* v. *Sims,* 377 U.S. 533, 577 (1964), with respect to the census count of the population in the United States. But in this case, the evidence shows that there is substantial doubt as to the accuracy of the census for the City and County of Denver and that there is a practicable way to make the census more accurate. The statistical data from sources such as numbers of telephones, water taps, sewer taps, building permits, electric and gas connections and usage, and studies of population by traditional agencies of regional government, as well as the results of the special survey of the City of one-third of the living units in the City and County of Denver belie the preliminary population figures of the Census Bureau.

The area which appeared to cause the inaccuracy of the Census Bureau was its deeming too many of the living units of the City and County of Denver vacant and therefore not counting the people who reside in those living units. Petitioners proposed that these

be verified as against the results of the City's special survey as well as for the remainder of the City. The Census Bureau balked at the ideas that it erred and that the information gathered by the City was valid and that any such verification would be worthwhile or produce results different from the preliminary figures.

The trial court disagreed with the Census Bureau after having heard testimony and received evidence on Petitioners' application for a preliminary injunction. The District Court found that while it may be that definitional differences between the City and the Census Bureau as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City, there is no way that the actual effect of such definitional differences can be verified unless the City can discover which dwellings the Bureau counted as vacant as of April 1, 1980.

The District Court found that to deny the City discovery of the information concerning vacant units will essentially deny it any meaningful ability to challenge the Bureau's determinations. The District Court recognized and stated in its order that extremely important constitutional rights are at stake in this case, including the representation in Congress and in the State General Assembly.

The purpose of Title 13 U.S.C. is to enable and assure an accurate and complete enumeration of the population so that in districting for legislative representation, each man's vote will be equal to another's. However, in this case, the claim of the Census Bureau and the interpretation and application of the Court of Appeals of the confidentiality provisions of that statute impede the goal of an accurate and complete enumeration.

Petitioners do not submit that the confidentiality provisions of Title 13 U.S.C. are themselves unconstitutional, but only that the interpretation and application of those confidentiality provisions to the facts in this case result in an impermissible restraint on attaining the most accurate and complete enumeration which, as a practical matter, can be performed under these circumstances.

THE ADDRESSES OF LIVING UNITS IN THE CITY DEEMED TO BE VACANT ON APRIL 1, 1980 BY THE CENSUS BUREAU ARE NOT PROTECTED BY THE PRIVILEGE OF CONFIDENTIALITY OF SECTION 9 OF THE CENSUS ACT

The purpose of the confidentiality afforded certain data gathered by the Census Bureau is to assure that respondents will not be identified as a result of responding to the Census. The City's request for a list of vacant housing units is not interdicted by, nor does it abrogate, this concern and purpose because these address lists will not disclose the names and identities of census respondents. The order of the trial court expressly provides that this information shall not be provided to the City.

13 U.S.C. § 9(a)(1) does not bar disclosure since the "use [of] the information furnished under the provisions of this title [is prohibited] for any purpose other than the statistical purposes for which it is supplied." The City will use these lists for precisely those statistical purposes for which that information is intended, i.e., to ensure an accurate count of the population of the City in the 1980 Decennial Census. A fair reading of the term "furnished" in view of the purposes of § 9 is that it is intended to encompass personal information provided by the Census Bureau by census

respondents. The order of the trial court expressly limited the use of this information to the purposes of the 1980 Decennial Census.

The Court of Appeals cites only *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977) as authority for its strict interpretation of an absolute interdiction of the confidentiality provisions of 13 U.S.C. § 9. Unlike the instant case, the plaintiffs in *Seymour* were not seeking disclosure of census information for statistical purposes; rather those plaintiffs sought names and addresses for the purpose of sending notices to potential class members in an anti-trust action. Moreover, the plaintiffs in *Seymour* sought disclosure not just of addresses but of names and addresses of companies the Census Bureau had placed in twenty one substantive categories. The categories described the businesses of the firms listed, and, hence, obviously reflected the information provided by the companies in the census reports.

13 U.S.C. § 9(a)(2) does not bar disclosure since the City seeks no "publication" of the list of vacant units.

13 U.S.C. § 9(a)(3) does not bar disclosure since the City does not seek to examine census questionnaires.

THE ORDER OF THE DISTRICT COURT DID NOT VIOLATE THE PRIVILEGE

Assuming, *arguendo*, that the addresses of vacant living units are protected by the privilege of confidentiality because, as the government argues, that information was directly or indirectly furnished by respondents to the census, the order of the District Court did not violate that privilege.

The District Court determined that the withholding of the addresses of vacant living units would deny

the City any meaningful ability to challenge the Bureau's determinations of the population of the City and that the discovery of those addresses is clearly relevant and indispensable to the City's case. The District Court further found that the purposes of Section 9 of Title 13, U.S.C. can be maintained, and conditioned and subjected the discovery order by (1) allowing the Bureau to provide lists of vacant units as opposed to the Follow-up Address Register itself, (2) allowing the Bureau to shield the identity of respondents to the census, (3) requiring the employees, officers and agents of the City who would have access to those addresses to be sworn to the same oath of secrecy as are personnel of the Bureau, (4) restricting access to the information to those persons so sworn to secrecy, (5) subjecting those persons to contempt of the Court for violation of the non-disclosure limitations, (6) restricting the use of the information to the seeking of the correct population figure for the City, (7) prohibiting the publication of the addresses, (8) allowing personnel of the Bureau to monitor and participate in the activities of the City in using the information, and (9) requiring the City to pay the expenses associated with the disclosure and the use of the information in the event that the City fails to succeed in showing that its population exceeds 500,000.

The City submits that this information shall be as secure as, if not more than, it is presently. The safeguards include not only those applicable to personnel of the Bureau, but also the superintendence and order of the District Court. The privilege will be honored and will remain whole.

CONCLUSION

The discovery order of the District Court is not prohibited by the confidentiality provisions of the Census Act but is consistent with the purposes of that

Act and of the U.S. Constitution. To deny Petitioners discovery of the information concerning vacant living units is essentially to deny it any meaningful ability to challenge the population determinations of the U.S. Census Bureau in the 1980 Decennial Census. The information must be provided to the City to ensure the realization of the Constitutional requirement of one man one-vote. For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX P. ZALL
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Counsel of Record for Petitioners

GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Attorney for Petitioners

APRIL, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS,

VS.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS.

ORDER

The plaintiffs in this action challenge the population count reached by the Bureau of the Census for the City and County of Denver, Colorado. The plaintiffs filed a motion for temporary restraining order and a motion for preliminary injunction. In connection with those motions, the Court has heard extensive evidence regarding the Census Bureau's methodology and the City's challenges to the census count. The Court is therefore well acquainted with the issues ultimately to be raised on the merits.

In addition, the plaintiffs have filed a request for production of documents, together with a motion to have production expedited because of the short time period in which census challenges must be determined. In that request, the plaintiffs seek the "Follow-Up Address Registers" (FARs) and "any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver."

The thrust of the City's challenge to the census is directed to the Bureau's determination that there were over 16,000 vacant housing units in the City on April 1, 1980, the effective date of the census. The City's trained and experienced real estate assessment personnel have conducted actual checks of about one-third of Denver's residential real estate units, and as a result of that survey, the City contends that the Bureau has "over-counted" vacancies by a factor of 46%. However, it has been impossible for the City to challenge the Bureau's finding that any particular housing unit was "vacant" on April 1, 1980 because the Bureau has declined to inform the City which units it counted as vacant. For the purpose of contesting the vacancy count, the City seeks to discover the list or register of those dwellings defined by the Bureau as "vacant" in the 1980 census. The Court therefore concludes that the request for production essentially relates only to the FARs, or other documents which contain the vacancy information, and this Order is directed only to those documents. The City has conceded that production of the FARs will satisfy the instant discovery request, despite the overbreadth of its original request for production.

The Bureau in refusing the discovery request, relies primarily on the contention that the information sought is confidential because it falls within the meaning and intent of 13 U.S.C. section 9. The Bureau argues that Congress provided for confidentiality of all census return information in order to assure voluntary compliance by census respondents so that accurate data can be compiled, and that section 9 prohibits the discovery here sought.

In response, the City contends that the purpose of the confidentiality provision would not be undercut by providing vacancy lists, since neither the names of

census respondents nor answers to census questions need be provided. In addition, the City argues that 13 U.S.C. section 9 does not bar this discovery because that section only prohibits "use [of] the information furnished for any purpose other than the statistical purpose for which it is supplied." The City asserts that this is precisely the purpose, and the only purpose, for which the information will be used.

The Court has considered carefully the foregoing arguments as well as the evidence presented by both sides in the substantial proceedings held to date. In particular, the Court has considered evidence presented by the Bureau which indicates that definitional differences between the parties as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City. Despite this evidence, it appears to the Court that there is no way that the actual effect of the definitional difference can be verified unless the City can discover the FARs, which will tell the City *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination. Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure 500,000 is a threshold of city size affecting both state and federal grants. The Bureau proposes a 1980 census for Denver just over 491,000, whereas Denver claims its population is over 500,000 and that the vacancies in dispute would make up the difference if fully counted. The Bureau has admitted that it undercounted by about 2.5% as a national average in 1970. Obviously

an adjustment of that magnitude also would put Denver over 500,000.

Considering the intent and purpose of the confidentiality requirements of 13 U.S.C. section 9, the Court concludes that the purposes of that section can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

Accordingly, it is

ORDERED that the defendants shall produce the FARs for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980;

ORDERED that the defendants shall delete from said information any and all names of persons or other references which might identify respondents to the census, either directly or indirectly;

ORDERED that every employee, officer, or agent of the City and County of Denver before having access to the information provided shall be sworn to the same oath of secrecy and confidentiality as required of personnel of the Bureau of the Census;

ORDERED that the plaintiffs shall not allow any person subject to their control and not subject to such oath access to the information made available hereunder;

ORDERED that a copy of this Order shall be served upon every employee, officer or agent having access to the information provided by the Bureau, and every such employee is hereby ORDERED not to disclose such information to anyone not subject to the oath of confidentiality;

ORDERED that the information provided pursuant to this Order shall not be used for any purpose except

to seek the correction or adjustment of the population figures for the City and County of Denver for the 1980 census;

ORDERED that the information provided hereunder shall not be publicized or made public in any way;

ORDERED that the defendants may at their option provide one more of their employees, officers or agents to accompany each employee, officer or agent of the plaintiffs in checking and verifying the April 1, 1980, status of occupancy or vacancy of the living units at issue, and in the event that the defendants elect to follow this procedure and the population of the City and County of Denver is ultimately determined to be under 500,000, the defendants may apply to the Court for reimbursement by the City of the reasonable and necessary expenses incurred in making this cooperative effort with the plaintiffs;

ORDERED that the plaintiffs, by accepting the information made available through this Order, accept as a condition thereof the foregoing Order regarding payment of the defendants' reasonable and necessary expenses;

ORDERED that this Order shall be effective immediately as of the date written below; provided, however, that enforcement of the Order is hereby stayed for a period of seven days from that date, and

ORDERED that a copy of this Order shall be served immediately on the United States Attorney for the District of Colorado.

Finally, the Court finds and concludes, pursuant to 28 U.S.C. section 1292(b), that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

DATED at Denver, Colorado, this 17 day of September, 1980.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN, Judge
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2023

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS-APPELLEES,

vs.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

John F. Cordes (Alice Daniel, Assistant Attorney General, and Leonard Schaitman, Attorney, Civil Division, Department of Justice; and Joseph F. Dolan, United States Attorney for the District of Colorado, with him on the briefs), Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

George J. Cerrone, Jr., Assistant City Attorney (Max P. Zall, Attorney for the City and County of Denver, with him on the brief), Denver, Colorado, for Plaintiffs-Appellees.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKay, Circuit Judge.

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title,

> shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of the Census and by otherwise limiting any further publication of the ordered information.

---

[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. *See Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver's population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b), (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizens is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us

to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

---

[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.

Office Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

MAX P. ZALL
City Attorney
GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665

Counsel for Petitioners

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Respondents

PETITION FOR CERTIORARI FILED APRIL 24, 1981
CERTIORARI GRANTED JUNE 15, 1981

TABLE OF PARTS OF THE RECORD

	PAGE
District Court Docket Entries	1
Complaint	7
[Excerpts from] Transcript Of Proceedings On Plaintiffs' Motion For Temporary Restraining Order And Nominal Bond, dated September 3, 1980	24
[Excerpts from] Transcript Of Proceedings On Plaintiffs' Motion For Preliminary Injunction, dated September 15, 1980	33
Plaintiff's Exhibit # 2	83
Plaintiff's Exhibit # 3	85
Plaintiff's Exhibit # 7	88
Plaintiff's Exhibit # 17	111
District Court Order, filed September 17, 1980	113
Tenth Circuit Order, dated September 29, 1980, granting the government's petition for an interlocutory appeal	118
Tenth Circuit Order, dated September 29, 1980, staying the district court's disclosure order indefinitely	119

DISTRICT COURT DOCKET ENTRIES

PLAINTIFFS

WILLIAM H. McNICHOLS, JR., et al.

DEFENDANTS

PHILIP M. KLUTZNICK, et al.

CAUSE

Complaint for violation of the Freedom of Information Act 5 USC 552 (a) & Complaint arising under the laws of the U.S. relating to the taking of the decennial census and to the apportionment of Congressmen in the House of Representatives 13 USC 1 et seq.

ATTORNEYS

Max P. Zall, City Attorney
George J. Cerrone, Jr., Asst. City Attorney
353 City & County Building
Denver, Colorado 80202
(303) 575-2665

Scott Crabtree
Asst. U. S. ATTORNEY
U.S. Courthouse, Room C-330
Denver, Colorado 80294
837-2065

DATE	NR.	PROCEEDINGS
9/3	X	COMPLAINT — pd Issued Summons

	X	MOTION for Temporary Restraining Order and Nominal Bond . . . by Plft's.
		HEARING (JRC) Motion for TRO and for Nominal Bond . . . Statements of counsel . . . With Exhibits . . . Preliminary Injunction hearing set for 9/15/80 9:00 am. Briefs by Plfts due 9/10/80. Defts answers due 9/12/80 . . . eod 9/3/80 (TRO Exhibits in Brown env.)
9/8	X	Application for Preliminary Injunction . . . COD
		Plf Memo Brief-Prel Injunction
9/12	X	Transcript of Proceedings on Plf Motion for TRO and Nominal Bond
		Def Brief in Opposition to Motion for Prel Injunction . . . COM
		Supp Authorities Prel Injunction . . . COM . . . COM
9/16	X	MOTION Of Plf For Expedited Production of Documents . . . COD unsgd
9/15	X	HEARING Plf Motion for Prel Injunction . . . witnesses . . . exhibits . . . closing argument . . . matter taken under advisement . . . eod 9/17/80
9/16	X	HEARING Plf Motion for Expedited Production of Documents . . . ORDERED local rule refiling of discovery requests waived and plf Exhibit 17 rec'd and made part of record . . .

leave granted def counsel to make oral motion for protective order and it will be considered . . . def counsel may supplment record w/written motion. plf motion GRANTED subject to the following: only info to be produced is that concerning vacant housing units and then only information re: addresses, personal info to be deleted . . . no person not having taken oath prescribed by Bureau and statute shall have access to info provided . . . when order reduced to writing, it shall be served on all city employees that will work w/info . . . info provided is to be used only for census adjustment purposes . . . def may apply for specific protective orders re: specific info . . . Bureau may apply for and recover any reasonable expenses necessitated by this order . . . Bureau given option of accompanying city employees on cks of addresses provided . . . plf to submit proposed order court makes positive findings re: 28 USC 1292(b) and this finding will be incl in written order for appeal purposes . . . bond set of $25 subject to increase upon proper showing . . . eod 9/17/80

9/17 X Transcript of Court's Ruling on Motion for Expedited Production of Documents

X ORDER (JRC) . . . defs shall produce FARs for Denver to plf or produce list derived from FARs which lists ad-

dresses of living units in Denver which Bureau determined vacant 4/1/80 . . . defs shall delete names or other references which might identify respondents to census . . . every employee etc having access to info provided shall take oath of secrecy and confidentiality as required of personnel of Bureau of Census . . . plfs shall not allow any person subject to their control and not subject to oath access to info . . . cy of this Order to be served on every employee etc having access to info and such employee ordered not to disclose such info to any person . . . info provided pursuant to this Order not to be used for any purpose except to seek correction or adjustment of population figures for Denver 1980 census . . . info provided shall not be publicized in any way . . . defs may at their dis[cretion] provide one [or] more employee in checking 4/1/80 status of occupancy and if defs follow this procedure and population of Denver is under 500,000, defs may apply to court for reimbursement by City of reasonable expenses . . . plfs by accepting info made available thru this Order accept as condition thereof the foregoing order re: payment of expenses . . . Order effective immediately provided that enforcement of Order is stayed for 7 days from this date . . . cy of Order shall be served

immediately on US Atty for Colo . . . court finds that this Order involved control question of law and an immediate appeal from this Order may materially advance ultimate termination of the litigation . . . COM . . . eod 9/17/80

9/23 MOTION For Transfer to MDL w/brief attached . . . COM

MOTION of Defs for Expedited Response to and Hearing on Def Motion for Transfer. brief attached . . . COM

9/24 Marshal's Return S&C USAG by cert mail 9/5/80; Leo Schilling 9/18/80; Vincent Barabba by cert mail 9/5/80; Philip M. Klutznick Sec of Commerce 9/5/80 by cert mail; US Bureau of Census by cert mail 9/5/80; US Dept Commerce by cert mail 9/5/80. Tackion Grayson agent for US Atty 9/5/80

1980

9/24 X MOTION For Extension of Stay . . . COM

6/25 X MINUTE ORDER (JRC) . . . the stay of this Court's Order of 9/17/80, is extended to 5:00pm 9/29/80 . . . No further extension will be granted by this Court . . . COM . . . eod 9/25/80

X TRANSCRIPT of Proceedings on Plft's. Motion for Preliminary Injunction of 9/15/80

X TRANSCRIPT of Proceedings on Plft's

Motion for Expedited Production of Document of 9/16/80

9/26 Plft's Exhibit List

HEARING (JRC) Motion for TRO . . . Statements . . . Parties announce Stipulation and withdraw application for TRO . . . ORDERED: Stipulation is made an order of this Court . . . The Gov't. will not honor any Cook County detainer without first giving Notice of 30 days to petitioner and counsel . . . eod 9/26/80

9/30 X Copy of ORDER from the Court of Appeals 9/29, that Defendants' PETITION FOR LEAVE TO APPEAL is granted. C.O.M. eod 10/1/80.

X Copy of ORDER from the Court of Appeals 9/29. that Defendant-Appellants' Motion for Stay is *granted*; the Order of the District Court of 9/17/80 is stayed until further order of the Court of Appeals. eod 10/1/80.

Miscellaneous Case Nos. 80-8043 and 80-2023 assigned by the Court of Appeals.

NOTE: Designation Conference set for Tues., 10/7/80, at 8:30 a.m. Transcript Order due: 10/10/80.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No._____

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, and the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado,

Plaintiffs,

vs.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce; VINCENT P. BARABBA, in his official capacity as the Director of the United States Bureau of the Census; LEO C. SCHILLING, in his official capacity as the Regional Director of the United States Bureau of the Census; the U.S. DEPARTMENT OF COMMERCE, one of the lawfully constituted departments of the United States of America; and UNITED STATES BUREAU OF THE CENSUS, one of the lawfully constituted agencies of the U.S. Department of Commerce.

Defendants.

COMPLAINT

Plaintiffs complain, allege and aver as follows:

1. *Jurisdiction.* Jurisdiction is founded on the following:

a. The existence of a Federal question and the amount in controversy. 28 U.S.C. 1331.

b. The existence of a Federal question arising under the laws of the United States relating to the taking of the decennial census and to the apportionment of Congressmen in the House of Representatives. 13 U.S.C. 1, et seq., and 2 U.S.C. 2.a.

c. The existence of a Federal question arising under an Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 28 U.S.C. 1337.

d. The existence of a Federal question arising out of a claim herein in the nature of mandamus. 28 U.S.C. 1361.

e. The existence of a Federal question arising out of a claim herein for a declaratory judgment. 28 U.S.C. 2201 and 28 U.S.C. 2202.

f. The existence of a Federal question arising out of a claim herein concerning public records and information and relief requested concerning disclosure thereof. 5 U.S.C. 552(a)(4).

g. The existence of a Federal question arising out of a claim herein for Judicial Review of administrative actions. 5 U.S.C. 702, 704, and 706.

h. The existence of a Federal question arising out of a claim herein concerning the violation of rights guaranteed by Article I, Section 2, Clause 3 of, and the Fifth Amendment to, the Constitution of the United States of America.

i. The amount in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

2. *Parties.*

a. Plaintiff, WILLIAM H. MCNICHOLS, JR., is a citizen, resident and duly registered and qualified voter of the United States of America, the State of Colorado, and the City and County of Denver. He is the duly elected and acting Mayor of the City and County of Denver.

b. Plaintiff, CITY AND COUNTY OF DENVER, is a municipal corporation of the State of Colorado, duly organized and existing under and by virtue of Article XX of the Constitution of the State of Colorado and has the capacity to sue and be sued (Denver).

c. Defendant, PHILIP M. KLUTZNICK, is the duly appointed and acting Secretary of the Department of Commerce of the United States (Secretary). Defendant, VINCENT P. BARABBA, is the duly appointed and acting Director of the United States Bureau of the Census, pursuant to 13 U.S.C. Section 21 (Director). Defendant, LEO C. SCHILLING, is the duly appointed and acting Regional Director of the United States Bureau of the Census for the Region which includes the City and County of Denver (Regional Director). On the basis of information and belief, it is alleged that, pursuant to 13 U.S.C. Section 4, defendant KLUTZNICK has delegated to defendant BARABBA the performance of all functions and duties relating to the 1980 decennial census that have been imposed by law on the Secretary of Commerce, the Department of Commerce, and the Bureau.

d. Defendant DEPARTMENT OF COMMERCE is a lawfully constituted department in the executive branch of the United States of America (Department); and defendant UNITED STATES BUREAU OF THE CENSUS is one of the lawfully constituted agencies within and of the U.S. Department of Commerce (Bureau).

3. In accordance with the requirements of Art. I, § 2, cl. 3 of the Constitution, the Congress has provided by law for the taking of a decennial census of the population of the United States. 13 U.S.C. §§ 1 *et seq.* Pursuant to 13 U.S.C. § 141, the Secretary of Com-

merce is directed to take such decennial census of the population as of the first day of April, 1980, said date to be known as the "decennial census date," and every ten years thereafter.

4. The tabulation of the total population by states as required for the apportionment of Representatives in Congress among the several states must be completed within nine months of the census date and reported by the Secretary to the President. On the basis of information and belief, it is alleged that the defendant KLUTZNICK has directed the defendant BARABBA to report the total population by states to him during the month of December, 1980.

5. Pursuant to 2 U.S.C. § 2a, the President is required, within one week of the convening of the first regular session of the next Congress in January, 1981, to transmit to the Congress a statement showing the whole number of persons in each state, as ascertained under the decennial census of the population, and the number of Representatives in the House of Representatives to which each state would be entitled under an apportionment of the presently-existing number of Representatives by the method known as the method of equal proportions, no state to receive less than one Member.

6. The defendants are also required, in accordance with the established practice of the Bureau, and the provisions of 13 U.S.C. § 141(c), to prepare and certify an official count of the population of cities and other governmental sub-units within each state. The official count of such cities and sub-units, as prepared and certified by the Bureau, is and must be used by the states to apportion Congressional districts within each state in accordance with the requirement of Art. I, § 2,

cl.3, so that all Congressional districts within a state contain, as nearly as is practicable, equal number of persons.

7. In the State of Colorado, pursuant to Section 44 of Article V of the Constitution of the State of Colorado, as amended, and Section 2-1-101 C.R.S. 1973, as amended, of the statutes of the State of Colorado, the apportionment and determination of Congressional Districts in the State of Colorado is based on the population of each district, as contained in the official count and enumeration prepared and certified by the Bureau in connection with the decennial census.

8. In the State of Colorado, pursuant to Sections 45, 46, 47 and 48 of Article V of the Constitution of the State of Colorado, as amended, and Sections 2-2-101 et seq. C.R.S. 1973, as amended, and Sections 2-2-201 et seq. C.R.S. 1973, as amended, of the statutes of the State of Colorado, the apportionment and determination of Senatorial and Representative Districts for the Legislature (General Assembly) of the State of Colorado is based on the population of each such district, as contained in the official count and enumeration prepared and certified by the Bureau in connection with the decennial census.

9. In the apportionment of Congressional districts within the State of Colorado following the 1970 decennial census, two of the five Congressional Districts allocated to the State of Colorado embrace all or part of the City and County of Denver. In the apportionment of state senatorial and representative districts in the State of Colorado following the 1970 decennial census, eleven of the thirty five state senatorial districts, and eighteen of the sixty five

representative districts embrace all or part of the City and County of Denver.

10. The amount and extent of representation of the City and County of Denver, on local, metropolitan, and regional governmental boards and commissions, such as the Metropolitan Denver Sewage Disposal District No. 1, is governed and directly affected by the population figures contained in the official count and enumeration prepared and certified by the Bureau in connection with the decennial census.

11. The Congress has established numerous programs of federal grants-in-aid to states, cities, and other sub-units that are based on the population of said states, cities, and sub-units, as contained in the official population count prepared and certified by the Bureau in connection with the decennial census, and in connection with the mid-year census authorized under 13 U.S.C § 141 and the collection and publication of general population data authorized under 13 U.S.C. § 181. Among such programs, are State and Local Fiscal Assistance (general revenue-sharing), 31 U.S.C. §§ 1221 et seq., and Comprehensive Employment and Training, (CETA), 29 U.S.C. §§ 801 et seq., under which the City and County of Denver, has received financial assistance from the United States, during the last fiscal year. The amount of federal funds to be received by the City and County of Denver, in the years following the 1980 decennial census will be affected substantially by the official population count of the City and County of Denver that is prepared and certified by the Bureau.

12. It has long been recognized by officials of the Bureau, including the defendant BARABBA, that the procedures employed by the Bureau in conducting the

decennial census, no matter how conscientiously and efficiently administered by the employees of the Bureau, will necessarily fail, and in the past necessarily have failed, to enable employees of the Bureau to personally contact and record substantial numbers of persons actually residing in the United States.

13. The Bureau has been able, through the use of demographic projection, looking to birth, death, and migration statistics and other factors, to make a demographically valid determination of the actual population of the United States as of the census date. The difference between the Bureau's determination of the actual population of the United States as of the census date, and the number of persons personally contacted and recorded by employees of the Bureau during the taking of the census, indicates the approximate number of persons who were not personally contacted and recorded during the taking of the census. During the taking of the 1970 decennial census, the Bureau concluded that there were approximately 10.2 million persons, actually residing in the United States, who were not personally contacted and recorded during the taking of the census. Of these 10.2 million persons, 4.9 million were included in the official count of the population of the United States by a method known as "imputation," and thus were allocated to the states, cities and sub-units of the United States as if they had been personally contacted and recorded during the taking of the census. The remaining 5.3 million persons, referred to by the Bureau as constituting the census undercount, were not included in the official count of the population of the United States by means of "imputation" or other demographic or statistical methods, and thus were not allocated to the official population

count of states, cities, and other sub-units of the United States.

14. On the basis of information and belief, it is alleged that the defendant BARABBA and the appropriate officials of the Bureau have determined that the numbers of persons actually residing in the United States as of the 1980 census date that will not be personally contacted and recorded by employees of the Bureau during the taking of the 1980 decennial census will be at least the same, and in all likelihood greater, than the number of persons actually residing in the United States that were not personally contacted and recorded during the taking of the 1970 decennial census.

15. The Constitution and laws of the United States impose upon the Secretary and the Director the duty to make a tabulation of the total population of the United States, and of every state, city and sub-unit of the United States that includes all persons found by the Bureau to actually reside in the United States and reasonably capable of being determined to reside within each state, city, and sub-unit of the United States at the time of the taking of the decennial census, even if such persons have not been personally contacted and recorded by employees of the Bureau during the taking of the decennial census.

16. Defendants have commenced and have continued to conduct the 1980 decennial census and the procedures thereunder in and within the City and County of Denver. In implementing those procedures, Defendants calculate a factor, known as the "vacancy rate" which, after being applied to the total number of living units, produces a negative correction factor to

the initial population figure computed from the number of living units and the number of persons calculated and estimated to reside in each living unit.

17. In accordance with the Local Review Program of the Bureau, Denver has been informed of the "vacancy rate" to be used by the Bureau. That rate is arbitrary, unreasonable, lacks any rational basis, is based on data collected in a manner which lacked reasonable care and was not calculated to produce a reasonable result.

18. Denver has disputed that "vacancy rate", has offered evidence to the Bureau of a different rate, and has requested from the Bureau the base data supporting the rate proposed to be used by the Bureau.

19. The Bureau has refused to reconsider the "vacancy rate" and refused to disclose the base data supporting the rate it shall use in the 1980 decennial census for Denver and has indicated an intention to close the district offices of the Bureau in the Denver area and transfer the base data and documents away from the Denver area to another part of the United States.

20. Denver has appealed the denial of the request for the public information and records to the Director; the law allows the Director up to six weeks to consider that appeal, without hearing, after his receipt of it in Washington, D.C.

21. As a result of the acts and omissions of defendants the following consequences will ensue in connection with the 1980 census:

a. The report of the Secretary of Commerce to the President of the "tabulation of the total population by states," as required by 13 U.S.C. § 141, will not in

fact contain a tabulation of the actual population of the states, either absolutely, or in relation to each other;

b. The statement submitted to Congress by the President, pursuant to 2 U.S.C. § 2a showing the "whole number of persons" in each state, and the number of representatives to which each state would be entitled under the equal proportions method, will not in fact show the "whole number or persons" in each state, either absolutely or in relation to each other, and cannot in fact show the number of Representatives to which each state properly would be entitled under the equal proportions method based on the actual population of all of the states in relation to each other;

c. In the allocation of Congressional seats within the State of Colorado, and in the allocation of state senatorial and legislative districts, and in the allocation to other local, metropolitan and regional governmental boards and commissions, the residents of the City and County of Denver will receive less proportionate representation in the United States House of Representatives and in the Colorado Senate and House of Representatives and such boards and commissions than the residents of other cities and sub-units in the State of Colorado;

d. In the allocation of federal funds based on the population of cities and sub-units, as contained in the official population count prepared and certified by the Bureau, the City and County of Denver will receive less than the proportionate amount of federal funds that it is entitled to receive according to law.

22. The acts and omissions of Defendants are violative of the Constitution and laws of the United States for the following reasons among others:

a. Art. I, § 2, cl. 3, and the laws of the United States relating to the taking the decennial census and

to the apportionment of Representatives in the House of Representatives, in particular 13 U.S.C. §§ 1 *et seq.*, and 2 U.S.C. § 2a, require that an enumeration be made of all persons determined to be actually residing in the states, cities, and sub-units of the United States, so that the apportionment of Representatives among the several states and the apportionment of Congressional districts within each state can be made in strict compliance with the principle of equal representation for equal numbers of persons. Accordingly they impose an absolute duty on the defendants herein to allocate all persons determined by the Bureau to be actually residing in the United States among the states, cities and sub-units of the United States in which they can reasonably be determined to be actually residing. This absolute duty is not satisfied by allocating only those persons personally contacted and recorded by employees of the Bureau during the taking of the decennial census when the Bureau has determined that substantial numbers of other persons, not so personally contacted and recorded, actually reside in the United States.

b. The methods used by Defendants in conducting the census in Denver and in formulating the population figure for Denver were unreasonable and lacked any rational basis, and their promulgation and use were arbitrary, capricious and an abuse of discretion.

c. The methods used by the Defendants in conducting the census in Denver and in formulating the population figure for Denver were not fairly and rationally suited to achieve and bring about the most accurate population count possible in view of the resources available to the Defendants and the inherent difficulty of the task.

d. The officers, employees and agents of Defendants responsible for taking of the census in Denver and for formulating the poplation figure for Denver did not exercise reasonable care and did not achieve as accurate a result as the Bureau's techniques permitted.

e. The methods used by Defendants in conducting the census in Denver and in formulating the population figure for Denver were and are violative of Art. I, § 2, cl. 3, and the laws of the United States, and further deprives the plaintiffs of important liberty and property interests without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

f. The methods used by Defendants in conducting the census in Denver and formulating the population figure for Denver have the effect of debasing the representation and the vote of persons residing and registered to vote in the City and County of Denver, which is disproportionately undercounted in relation to virtually every other city and sub-unit in the State of Colorado, in violation of Art. I, § 2, cl. 3, with respect to representation in and the election of Members of the House of Representatives of the United States, and in violation of the Fifth Amendment's Due Process Clause, with respect to representation in and the election of Members of the Colorado Senate and House of Representatives.

g. Since the entitlement of the Citiy and County of Denver to federal grants-in-aid under numerous federal programs depends on the official population count of the City and County of Denver, as prepared and certified by the Bureau, the arbitrary, capricious and irrational methods used by the defendants regarding the City and County of Denver deprives Denver of federally established property rights without due process of law, in violation of the

Fifth Amendment to the Constitution of the United States.

h. The refusal of Defendants to consider the data collected and presented, and to be collected and presented, by Denver concerning the "vacancy rate" for Denver and the refusal to disclose the data upon which the rate to be used by the Bureau in the 1980 decennial census is unreasonable, deny Plaintiffs due process of law, and violate, among other laws of the United States, the Freedom of Information Act.

23. The illegal and unconstitutional actions of the defendants, as set forth herein, have caused, and unless restrained by this Court, will continue to cause, the following injuries among others, to the plaintiffs:

a. Plaintiff, WILLIAM H. MCNICHOLS, JR., is a resident and registered voter of the City and County of Denver, like all other residents and registered voters of the City and County of Denver, has been deprived and will continue to be deprived of his right to equal representation in the House of Representatives of the United States, and of his right to have his vote for Members of the House of Representatives weighted equally, in relation to the representation and weight of vote of other residents and registered voters of the State of Colorado who reside outside of the City and County of Denver;

b. Plaintiff, CITY AND COUNTY OF DENVER, will be deprived of its full and fair representation in the House of Representatives of the United States, in that, in the reapportionment of Congressional districts within the State of Colorado following the 1980 decennial census, fewer Congressional districts will embrace part of the City and County of Denver;

c. Plaintiff, CITY AND COUNTY OF

DENVER, has been deprived and will continue to be deprived of substantial amounts of federal funds that are distributed proportionately to cities and other sub-units of the United States on the basis, in whole or in part, of the population of said cities and sub-units, as contained in the official population count, prepared and certified by the Bureau;

d. Plaintiff, WILLIAM H. MCNICHOLS, JR., as a resident and registered voter of the City and County of Denver, like all other residents and registered voters of the City and County of Denver, will be deprived of his right to equal representation in the Colorado Senate and House of Representatives, and of his right to have his vote weighted equally, in relation to the representation and weight of vote of other residents and registered voters of the State of Colorado who reside outside of the City and County of Denver;

e. Plaintiff, CITY AND COUNTY OF DENVER, will be deprived of its full and fair representation in the Colorado Senate and House of Representatives, in that in the reapportionment of state senatorial and legislative districts following the 1980 decennial census, fewer state senatorial and legislative districts will embrace part of the City and County of Denver.

24. As a result of the illegal and unconstitutional actions set forth herein, plaintiffs have suffered, and unless such actions are restrained by this Court, will continue to suffer, great, immediate and irreparable injury, in violation of rights guaranteed to them and obligations imposed upon the defendants by the Constitution and laws of the United States. Plaintiffs have no plain, speedy and adequate remedy at law, and the present action is the only means of securing the relief requested.

WHEREFORE, plaintiffs respectfully pray:

1. That This Court advance this matter on its docket, order a speedy hearing at the earliest practicable date and cause this case to be in every way expedited, so that any relief ordered by this Court in favor of the plaintiffs herein can be implemented in advance of the time that the defendant BARABBA reports the total population of the United States by states to the defendant KLUTZNICK, and in advance of the time that the defendants prepare and certify the official count of the population of the cities and subunits of the United States.

2. That This Court determine and declare the rights and duties of the parties herein, including:

a. Determining the "vacancy rate" for the City and County of Denver for the purposes of the 1980 decennial census;

b. Determining that the methods used by the Bureau in conducting the census and computing the population figure for the City and County of Denver are unreasonable and unlawful in that they lack any rational basis and are not reasonably related to the purpose of the census and that they were not implemented with reasonable care by the Bureau;

c. Declaring the right of the City and County of Denver to have access to, and inspect the records, data and information of the Bureau upon which is based the "vacancy rate" for Denver; and

d. Declaring the duty of the Bureau to take into consideration the data provided and to be provided by Denver in determining the "vacancy rate" for the City and County of Denver.

3. That This Court enjoin Defendants from:

a. Closing the District Offices of the Bureau in the Denver area until this matter is finally determined;

b. Transferring the records, data and information concerning the "vacancy rate" for Denver from the Denver area until this matter is finally determined;

c. Refusing to accept data from Denver concerning the "vacancy rate" for Denver;

d. Refusing to provide Denver with the records, data and information upon which the Bureau is basing their "vacancy rate" for Denver;

e. Certifying, in any way, the population figure for Denver resulting from the 1980 decennial census until this matter is heard and finally determined.

Respectfully submitted.

MAX P. ZALL, #2367
Attorney for the City and County of Denver
GEORGE J. CERRONE, JR., #3430
Assistant City Attorney
Attorney for the Plaintiffs

By /s/
George J. Cerrone, Jr., #3430
353 City and County Building
Denver, Colorado 80202
(303) 575-2665

Name and Address of
Plaintiffs:

William H. McNichols, Jr.
City and County of Denver
350 City and County Bldg.
Colfax and Bannock Sts.
Denver, Colorado 80202

AFFIDAVIT

City and County of Denver
ss.
State of Colorado

WILLIAM H. MCNICHOLS, JR., being first duly sworn and upon his oath, deposes and says that he is the Mayor of the City and County of Denver, State of Colorado, that he is one of the Plaintiffs herein, that he has read the above and foregoing Complaint and that the same is true of his own knowledge, except as to those matters stated therein to be upon information and belief, and as to those matters, he believes them to be true.

Dated: September 2, 1980.

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. McNICHOLS, JR., et al.
Plaintiffs,

v.

PHILIP M. KLUTZNICK, et al,
Defendants.

TRANSCRIPT OF PROCEEDINGS ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND NOMINAL BOND

[COPY]

Proceedings before the HONORABLE JIM R. CARRIGAN, Judge, United States District Court for the District of Colorado, beginning at 11:05 o'clock a.m., on the 3rd day of September, 1980, in Courtroom C203, United States Courthouse, Denver, Colorado.

APPEARANCES.

The Plaintiffs appearing by their attorney, GEORGE J. CERRONE, JR., Assistant City Attorney, Room 353, City and County Building, Denver, Colorado;

The defendants appearing by their attorney, C. SCOTT CRABTREE, Assistant United States Attorney, C330 United States Courthouse, 1929 Stout Street, Denver, Colorado;

WHEREUPON, the following proceedings were held:

* * * * *

[22]

THE COURT: I will withhold ruling and see if there is any objection.

Q. [By Mr. Cerrone] Mr. Sullivan, in your participation in the Local Review Program, did the Bureau of the Census provide to the city any preliminary figures regarding the finding which they made in their census?

A. They provided us on July 23rd with preliminary per capita count of the city along with some additional information, including the methodology arrived at. And one of the factors given us on that date was the vacancy factor that they had arrived at.

Q. And what was that vacancy factor?

A. On that date it was 6.3 percent.

Q. And has it changed since then?

A. As of last Thursday we understand it has been raised to 6.8 percent.

Q. And what was the total number of population which the Bureau has preliminarily indicated to the city?

A. The first figure given us was 455,000 people. The so-called final count that was given us last Thursday was 491,651, so there was an increase of 36,000 during the local review process.

Q Mr. Sullivan, I hand you what's been marked as plaintiffs' exhibit number 2 and ask whether you can identify that.

THE COURT: Excuse me. You said the first figure was

* * * * *

[27]

MR. CERRONE: Yes, Your Honor. According to the regulations of the Bureau—

THE COURT: I'm just making a record. You may proceed.

MR. CERRONE: It was attached, yes, Your Honor.

Q. [By Mr. Cerrone] Mr. Sullivan, has the City and County of Denver commenced an effort to determine on its own what the vacancy rate for the City and County of Denver is?

A. At the time the original preliminary figures were furnished us, and the clock started running on our review — and I want to point out that part of the stated effort of the Census Bureau by Mr. Barabba was to utilize the expert knowledge of local officials in helping to turn in—

MR. CRABTREE: I'm going to object to that. I don't know that he's qualified as to what Mr. Barabba's intentions were in setting up the program. I think we've got the exhibit here.

MR. CERRONE: Your Honor, the exhibit number 1, the very first page of the exhibit, which I assume has been promulgated by Mr. Barabba, indicates that the purpose for the Local Review Program is for the obtaining of the local expertise and knowledge to make the figures that are arrived at by the Bureau of the Census more reliable, and, therefore, more acceptable.

THE COURT: Well, that's argument, I think, and let the witness testify as to what he knows.

A At that time, in an effort to challenge the figures,

|28|

which we were given the opportunity to do, there were a number of things that we were not terribly pleased with. One was the figure given us for the number of housing units in the City and County of Denver. Two, the fact that the vacancy factor was very contradictory to all the evidence that we had. And, three, that we were positive from the preliminary work that we had done while the census was actually being conducted by the Bureau, that there are a great many more than 455,000 people in the City and County of Denver.

As part of that and one of the easiest things to work with — work with the Bureau on, was the vacancy factor. There were a number of factors were brought out in conversations with Mr. Gordon Ashley, the District Manager for the Bureau for the City of Denver, as well as Mr. Ken Ellwenger, who was the Assistant Regional Director, that we would have to agree with and that it was impossible to challenge.

They informed us that if people did not answer the questions, and we were specifically talking about the illegal alien problem at the time, that they did not count them. Under the regulations we had to agree that while there may be a great number of them here, if they refused to answer questions by the Census Enumerators, that it would be very difficult for the Bureau to count them. In those areas we did offer some evidence to them. As you know, there is a program where those people are entitled to food stamps, and we are furnishing a great

* * * * *

|30|

their problems, that probably the easiest way to get to a most accurate count was to work on the methodology

involving the housing units, which are the easiest thing for us to prove or disprove. One, we have a great number of records, some of which we asked the Census Bureau that they had used, such as the water and sewer taps, the response was in the negative. We know how many units were added in the ten years between 1970 and 1980. We asked whether that was taken into account or not, and they replied that it was.

We have to assume that at least some of those units, and there were 35,000 net gain in units during that period, were used by them. Nevertheless, the methodology of the counting of vacant units in the city, as well as the total number of housing units, seemed to be the easiest area for us to work with them on.

We did not start with taking a random sample. What we started with was using their enumeration districts, of which there are 606 I believe it is in the city, in the city limits, and we took the ones that they had pinpointed in cross figures as having the highest vacancy factor and we started there. It was not a random sample, it was a door-to-door taking in those enumeration district, of which we have completed about 25 percent.

We are not taking the census over again, we have no intention of taking the census over again, or the entire city,

[31]

all we are working on is the vacancy factor of the units that they say of the total number of housing units in the city that they say are vacant. Because the methodology is, and, frankly, I'm not sure where they came up with the figure, but they stay—

MR. CRABTREE: Excuse me, Your Honor, I

forget what the question is, but this is a rather rambling dissertation. Could we get back to—

THE COURT: I think it would be a little more orderly if we could do this on a question-and-answer basis, so if something irrelevant and hearsay creeps in at least counsel will have an opportunity to object.

MR. CERRONE: Thank you, Your Honor, I will.

Q. [By Mr. Cerrone] Mr. Sullivan, you indicated that when you initially received the preliminary information from the Bureau of the Census, did you, that is, the city have a doubt as to its accuracy? And this doubt was created by, as you indicate, with some evidence which it has, and you indicated that part of that evidence was water and sewer taps. What else, if any, facts, or elements, entered into the judgment of the city that made them compare with the Bureau of Census figures?

A. The figures we had available from people working in the housing area all the time, such as the Board of Realtors, as to the vacancy factor in the city, and that figure was — that figure was less than three percent.

[32]

Q. And were there any other sources of information which led you, or led the city to believe that the vacancy rate was not as high as the Bureau of Census indicated?

A. We thought we had an accurate count of the housing units through our building records and our assessment records, which, incidentally, are public knowledge, including the owners of such property. Using that figure, and using all the data that was available to us by the Governor's office, Governor Lamm made the chief census person available to us as

well as the Regional Counsel of Governments who are continually updating housing and vacancy factors, the Board of Realtors, Post Office Department, every public agency and every quasi-public agency and public utility that we could check with.

Q. Did you check with the telephone company?

A. I did.

Q And what did their — what was their response?

A. Their response was that — they told us in gross figures the number of residential telephone units that had been installed since 1970 as opposed to now, the figure was considerable.

Q. Do you have that figure available at this time?

A. No, I do not. I have the water tap increase and all the other tap increases.

Q. Does the city intend to continue its local efforts in attempting to determine a vacancy rate?

* * * * *

[35]

figure of population for the City and County of Denver was for 1970?

A. 1970 was 514,800.

Q. To your knowlege, the representation of the City and County of Denver is based upon that number?

A. That's correct.

THE COURT: 514,800?

THE WITNESS: Yes, sir.

Q. [By Mr. Cerrone] So a decrease in that number will quite logically mean a decrease in the number of representatives and senators in the state legislature?

A. That is correct.

Q. And likewise regarding the people that are

represented by the two congressional representatives that we are speaking of?

A. The First and Second Congressional Districts, yes.

Q. And a reduction in that number will also mean a reduction in the number of federal and state funds that are given to the city, which are based on population?

A. That is correct.

MR. CERRONE: Your Honor, I have no other further questions of this witness at this time.

THE COURT: Let me just clarify something. That figure of 30 million to 35 million as last year's grant is based, at least partly, on population figures, is that all

* * * * *

[47]

but just so that I can be on the record.

THE COURT: All right.

MR. CRABTREE: Because this is the information conveyed to me.

That the F.A.R., which stands for Field Address Register, for the Denver office, which is still here, will be kept here and maintained in either the Denver regional office or an office here located in the Denver metropolitan area, which would provide the city the information necessary in the event that that would be ordered produced.

Likewise, we will retrieve the F.A.R.'s for the Lakewood office, which are presently in California, and also put them together with the Denver F.A.R.'s in one central repository so that they could be retrieved.

And then I think maybe we did intentionally make the last part vague because I didn't directly address that with counsel, but I just assumed that if ordered by a Court, the Census Bureau would perform their func-

tion with the personnel they would have to obtain.

THE COURT: Is that the basic agreement, Mr. Cerrone?

MR. CERRONE: Yes, sir, I believe that's fairly stated.

THE COURT: Now, let me just make inquiry about a couple of practical points.

Am I to understand that the city is in the process now of some form of administrative appeal within the Bureau of

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. McNICHOLS, JR., et al.,
Plaintiffs,

v.

PHILIP M. KLUTZNICK, et al.,
Defendants

TRANSCRIPT OF PROCEEDINGS ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[COPY]

Proceedings before the HONORABLE JIM R. CARRIGAN, Judge, United States District Court for the District of Colorado, beginning at 9:15 o'clock a.m., on the 15th day of September 1980, in Courtroom C203, United States Courthouse, Denver, Colorado.

APPEARANCES:

The plaintiffs appearing by their attorneys, GEORGE J. CERRONE, JR., Assistant City Attorney, and STEVEN J. COON, Assistant City Attorney, Room 353, City and County Building, Denver, Colorado;

The defendants appearing by their attorney, C. SCOTT CRABTREE, Assistant United States Attorney, C330 United States Courthouse, 1929 Stout Street, Denver, Colorado;

WHEREUPON, the following proceedings were held:

* * * * *

[18]

Q. Mr. Licht, would you indicate to the Court the results thus far of the survey which you have supervised and made?

A. We have contacted 72,337 housing units in the City and County of Denver and we find that of those 72,337 that there are 3,825 vacancies. Comparing this to the—

THE COURT: What's that figure? Three thousand—

THE WITNESS: —eight hundred twenty-five.

THE COURT: 3,825.

Q. [By Mr. Cerrone] And what percentage vacancy is that, Mr. Licht?

A. Of those that we did, 5.3. Now when we started out doing the survey, the door-to-door canvassing—

THE COURT: Excuse me, is that vacancy rate as of April 1st, 1980?

THE WITNESS: Yes.

A. In some cases, not all cases; in some cases we couldn't find from the manager of the apartment house what the vacancy was as of April 1st, but the majority of the cases it is April 1st.

The 5.3 vacancy that we show is a high and I'll try to explain it if I can. When we were assigned this duty by the Mayor, we knew that with our limited staff we could not finish the 228,000 units so we thought we would go through those at a — that appeared to have the highest vacancy so we —

*

|19|

Q. |By Mr. Cerrone| Appeared in what way?

A. From the information that we received from the Census Bureau indicating their vacancy rate. So we took the enumeration districts that had a vacancy rate per the census of 10 percent or more and went through those, and this is why the vacancy rate is at 5.3 when we think it's slightly more than three percent.

The important thing about the results of our survey so far is that while we show a 5.3-percent vacancy for those same districts that the Census Bureau did, they come up with 7,059 vacant units, or a vacancy rate of 9.6. Computing the difference as a percentage, the census has 46 percent more vacant units than we found in our 72,000, or about a third of the city, and we think this is a rather—

THE COURT: How many is that? What was that last figure?

THE WITNESS: The 46 percent, their vacancy for the same enumeration districts was 7,059, and the percentage difference between the 7,059 and our 3,825 is 46 percent. What we attempted to do at that point was to take that error, as we determined it, of 46 percent, and apply it against their overall vacancy rate for the City and County of Denver of 7.1 percent. And that brought the vacancy rate, if we can use the third to apply to the entire population, of 3.834, and we think that's high, but using the same figures, the same enumeration

|20|

districts, and adjusting the vacancy, using the 46-percent error, we come up with 3.834 percent vacancy, based on this one-third sampling — not sample, but

one-third of the city.

Q. [By Mr. Cerrone] Mr. Licht, you indicated that you think that that was high, is this based upon the evidence that you have and your experience in the field?

A. Yes. The experience that I have in the City and County of Denver indicates that as of April 1st, this year.

MR. CRABTREE: Excuse me, Your Honor, I want to make sure we are talking apples and apples and not apples and oranges. And the reason I think that's important is because his experience is as an assessor, his experience is not as a — his function is to count the census. I want to make sure we are talking about the same definitions here, or what a vacancy is, for purposes of assessment and for purposes of—

THE COURT: Do you have an objection, Mr. Crabtree?

MR. CRABTREE: Well, I don't want to just object and say I don't think it's relevant, but if we can get back on the point then maybe I think the testimony would become more relevant. Yes, I'll object to it if he just wants to talk about what he's comparing it to.

THE COURT: All right, you may want to take Mr. Crabtree's remarks into consideration.

MR. CERRONE: Thank you, Your Honor.

[21]

I'll withdraw my last question and ask Mr. Licht whether or not he can identify what I am handing him, which is marked as — for identification as plaintiffs' exhibit number 7.

A. Yes. Plaintiffs' exhibit number 7 is a summary of those enumeration districts that the Assessment Division surveyed, and it shows the number of units

and number of vacants for the Census Bureau, for the Assessor's Office and for the Planning Department.

Q. [By Mr. Cerrone] Mr. Licht, is this a summary—

A. Yes.

Q. —of data?

Is the data which it summarizes available in your office?

A. Yes, it is. There are some 10,000 individual sheets that have at least — or no more than six property addresses on each one that back up this information. So we do have the addresses of those units that we find to be vacant.

Q. And these 10,000 documents which you have in your office are the base data, the data that were the — the sheets that were actually marked by the appraisers, the results and tabulations of which are reflected in plaintiffs' exhibit number 7?

A. That's correct. They were tabulated from the inventory sheets that we identified as exhibit number 6.

* * * * *

[27]

A. At what point in time?

Q. April 1st, 1980.

A. April 1st, no more than three percent.

MR. CERRONE: Your Honor, I have no additional questions of the witness at this time.

THE COURT: All right.

Cross-examination.

CROSS-EXAMINATION

BY MR. CRABTREE:

Q. Mr. Licht, you indicated that the function of

your office is to assess real and personal property, is that right?

A. That's correct.

Q. And that is for the purpose of assessing taxes on the residents in the City and County of Denver, is it not?

A. No, it's for the purpose of making assessments, the taxes are not in our department.

Q. But it is related directly to what taxes will be assessed on individual property?

A. The mill levies are put against our assessments, yes.

Q. All right. Would it be fair to say, Mr. Licht, that based upon that the appearance of an assessor at a Denver city residence door would be viewed as — for purposes of assessing the property as it might relate to potential taxes?

A. Not if we — in most cases if we identify ourselves and say we are from the Assessor's Office and indicate that we

* * * * *

[30]

A. No, sir.

Q. They could provide then, without any constraint on them, that information, say, to building inspectors, correct?

A. We could.

Q. All right. Are you conducting this survey during the period of time that the Bureau of Census was completing its census?

A. Yes, we were.

Q. Do you recall, Mr. Licht, reading any of the

Local Review Program brochures that came out?

A. After the fact I read a couple.

Q. What do you mean "after the fact"?

A. Well, after we started our review.

Q. Okay. And do you recall seeing in there that the Census Bureau had asked, during the period of time they were conducting their census, asking local communities not to do so because of the confusion it creates?

A. I think I remember reading that. However, we were up against the gun because of the imminent closing of the — your offices and the deadlines that we all know very well.

MR. CRABTREE: May I have just a moment, Your Honor? I want to make sure Mr. Cerrone has a copy of their letter — of a letter from their office.

THE COURT: Certainly.

MR. CRABTREE: I think I shouldn't have assumed that

* * * * *

[62]

Q. And in so making that opinion, did you have to have an opinion regarding the rate of vacancy or occupancy in the City and County of Denver, is that right?

A. On occasion, yes, it has been important.

Q. And has that been offered and admitted?

A. Yes, sir, it has.

Q. And what is your opinion regarding the rate of vacancy in the City and County of Denver?

THE COURT: As of what date?

MR. CRABTREE: What point?

Q. [By Mr. Cerrone] As of April 1, 1980.

A. I would estimate that there is probably a three and a four-percent actual vacancy rate in Denver County on the 1st of April of 1980.

MR. CERRONE: I have no further questions, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. CRABTREE:

Q. Mr. Rees, when you were performing your survey for the city, what were the hours that you were working?

A. Between 7:30 in the morning and 5:30 in the evening.

Q. Did you ever have occasion to go out and contact people at 7:30 in the morning?

A. Okay, I understand what you are asking now. We would usually start about 8:30 in the morning our actual field work.

* * * * *

[82]

MR. CRABTREE: Could I reserve an objection, Your Honor? It's quite lengthy and I haven't seen this before.

THE COURT: Fine. Maybe you'll have a chance to look those over at the noon break. The ruling will be held in reserve.

Q. [By Mr. Cerrone] Mr. Howell, has Doctor Cog made population projections and estimates for the City and County of Denver for the year 1980?

A. Yes, we have.

Q. Were those estimates and projections based upon the studies and the gathering of data as described in plaintiffs' exhibits 8, 9 and 10, and were they also funded by the federal government?

A. Yes.

Q. What was the population estimate and projection for the City and County of Denver in accordance with these studies for 1980?

A. Our January 1, 1980, estimate for the City and County of Denver is 521,300.

Q. I'm sorry, I didn't—

A. 521,300.

THE COURT: January 1, 1980?

THE WITNESS: Correct.

Q. [By Mr. Cerrone] And is there a similar figure for 1979?

[83]

A. Yes, it's — that estimate is 521,700.

Q. For 1978?

A. 522,500.

Q. For 1977?

A. I would have to refer to some of my documents.

Our estimate for the City and County of Denver for 1977 was 522,100.

Q. Are these estimates included in documents which are promulgated by the Denver Regional Council of Governments?

A. Yes, they are.

Q. These documents are promulgated by the Denver Regional Council of Governments in accor-

dance with their normal course of business and are in accordance with the funding that they receive from the federal government?

A. Yes.

Q. Mr. Howell, I have marked — I hand you what's been marked for identification as plaintiff's exhibit number 11 and ask whether or not you can identify it.

A. Yes. This was a 1975 report on our population estimates and actually it presents the population, as I say, we had prepared for each of the years 1970 to 1975.

Q. And this is an official document of the Denver Regional Council of Governments?

A. Yes, it is.

Q. And is it kept in the files of Doctor Cog?

[86]

A. Yes. This is a little report, status areas, that presents our 1980 population estimates by county.

Q. And this is a summary or status as a result of the study that you made in accordance with the procedures you described previously in your testimony?

A. Yes, it is.

Q. And I notice, Mr. Howell, that this is rather short compared to the rest of them, could you explain that?

A. Yes. The full report is on the printing press right now.

Q. So this is a preliminary report?

A. No, it's a summary of a report that will be available this week, but the numbers and the figures in

here are the same that will be in our final report.

Q. There is not going to be any difference between what is in here and what is in your final report?

A. No.

Q. And this effort is funded by the federal government?

A. Yes.

Q. And these figures are used by the federal government?

A. Yes, they are.

Q. And these figures — and what's contained in these documents show, among other things, the estimated projected population of the City and County of Denver?

A. They contain estimated populations for the City and

|87|

County of Denver, not projected.

Q. And you make those estimates in accordance with the procedures set out in plaintiffs' exhibits 8, 9 and 10?

A. Correct.

Q. And you have been doing this for how long? Or, excuse me, how long has the Denver Regional Council of Governments been doing it?

A. For about 25 years, since its existence as the Intercounty Regional Planning Commission.

Q. So the Denver Regional Council of Governments has been making population estimates and projections for 25 years.

A. Correct.

Q. And how long have you personally been in-

volved in this effort?

A. Five years.

MR. CERRONE: Your Honor, the city moves the admission of exhibits 11 through 16.

THE COURT: Any objection to exhibits 11 through 16?

MR. CRABTREE: Can I reserve that, Your Honor, just so I can look through them?

THE COURT: All right. These are official and public records, though, are they not?

MR. CERRONE: Absolutely, Your Honor.

THE COURT: I'll reserve ruling and give counsel an opportunity to look them over.

* * * * *

[109]

by the enumerator?

A. On a national level we had approximately 85 percent response rate to the census in the mail, so on an average 15 percent. But it would vary probably dramatically from one area to another.

Q. So each enumerator would have significantly less than the 300 addresses or units in an E.D. that they had to contact?

A. That's correct.

THE COURT: That's 300 addresses or living units?

THE WITNESS: Right, addresses, yes.

Q. [By Mr. Crabtree] Could you just briefly, Mr. Ellwanger, indicate what the steps were for the 1980 Census?

A. Okay. Well, in addition to hiring the initial staff that was necessary to — supervisory staff, the

first operation basically was to evelop a mailing list to be used on the census. It was developed from two sources, one source for the core city area would be through a purchase mailing list, in which we would update that mailing list through several post office checks and also by doing a precanvass operation to be sure that before the questionnaires went out on the census day that the addresses that we had were as complete as possible for the City and County of Denver, as an example.

In fringe areas surrounding the City and County of Denver, probably a small — probably a small part of the City and County of Denver, last fall we sent out enumerators to

[110]

actually do a precanvass of the area in which we were unable to purchase a mailing list and actually list every address that existed in that area.

Q. Would that be by personally observing each unit and then recording that?

A. Based with that and pounding on the door to identify what the actual address was of that unit.

Q. Well, then, you, prior to the mailout, had, according to you, an accurate indication of each and every address contained in the area or the enumeration district?

A. Yes, as accurate as is possible through a variety of checks. Then once the address list was developed and the questionnaires were mailed out on March 28th there was a period of time that we waited for the questionnaires to come back in, and which I indicated approximately 85 percent nationally were

returned. When those forms came in they were edited to determine whether they were accurately filled out or not.

We also had several assistance operations, a telephone assistance operation where people could call for assistance in filling out their form, and also some neighborhood assistance centers where people could visit for actual help in filling out the form.

Q. When you say "edited for accuracy," was there any comparison made by the Bureau of a returned questionnaire to

[111]

match up addresses?

A. Yes. The — each questionnaire is checked in to what we call the address registers, and it's by this procedure we identify which addresses did return a form and which did not.

Q. All right. And then the next step?

A. The next step would be to send out a staff of enumerators in what we call the Followup One, in which we attempted to contact each and every address that did not return the questionnaire and determine the status of that address.

Q. And what was being used then as the address comparison?

A. It would have been the master address register that the enumerator took out in the field with them along with a map of the enumeration district. And that enumerator's job was to spot on that map the location of that unit and to obtain an interview or to obtain — well, obtain both a completed interview for an occupied unit or also to obtain certain information

about the vacancy situation as well.

Q. All right. Was the enumerator able to add an address that they found there, or to change some address?

A. Yes, they were. They were instructed to, as they came to a unit, if they do not find it in the register, identify it as a new unit, they were to add it to the register and to obtain an interview.

[112]

Q. Now, after what was Followup One, and that information, what was done with what the enumerators had there?

A. Okay. At this point in time is when we — what we call the preliminary working figures were released on the Local Review Program to the local jurisdictions.

Q. Do you remember approximately when that was, Mr. Ellwanger?

A. It was in late July or early August, I believe, for the City and County of Denver. It varied by district office.

Q. And what did that preliminary working data consist of?

A. It consisted of housing information, the number of housing units, the number of vacant housing units, the vacancy rate, it included population data, population figure, persons per household.

Q. What's the difference between vacancies and vacancy rate?

A. Well, vacancies are just a physical count of the number of vacancies that have been reported at that stage of operation. The vacancy rate was calculated based on the total number of housing units for the ju-

risdiction.

Q. But to be able to report a vacancy, you had to have personal contact by the enumerator?

A. That's correct. That was the instruction that the enumerator had.

[113]

Q. Okay. Let's go to the next step after the preliminary data is provided.

A. Okay. At the same time that the Local Review Program was in process, we started what we called the Followup Two. This effort had two phases to it. The first phase was to follow up on all vacant and deleted lines of the address register. This was a hundred-percent recheck of all of these units to verify that those units were in truth vacant or did not exist as would be indicated by a deleted line on the register. The second phase of the operation was to follow up on field edit cases.

Q. I'm sorry.

A. Field edit cases, the cases that came in that were not complete, information missing on the questionnaire, or some other inaccuracy that we might identify. Also, we had a nonhousehold sources program in which we used some list of driver's licenses, names and addresses of individuals who verify whether we had counted individuals in parts of the community that tend to be difficult to enumerate, the minority areas and also the low-income areas.

Q. Okay. And then after this second followup — well, let me ask you a question about that. On the 100-percent recheck of vacancies, do you use a different enumerator?

A. Yes, a different enumerator is used than the first time. We use the best enumerators we have because at that

[114]

point of the census we tend to keep the good ones and have eliminated from our activities the poorer enumerators that we have, if we have identified any of those, and that enumerator again has to make a contact with someone to identify for sure whether that unit is vacant or not, or is referencing back to April 1st, 1980.

Q. Let me ask you more specifically about the determination of a vacancy. Are there some criteria that the enumerator has to utilize?

A. Yes. We basically count any structure, any unit that has a possibility of someone living in it. We tend to have a situation where unless it's an obvious nonliving quarter situation like simply a garage that it would not have any place above it for someone to live in it, or a barn, or something like this, or a commercial establishment, we instruct our enumerators to list that unit as a housing unit irregardless of the status of that unit as far as its construction or whether it's dilapidated or whatever, for the purpose that we do not want the enumerator to input their values into what someone might live in.

For example, we do not want an enumerator who is going door to door to enumerate to decide that a particular unit is one that they would not live in so thus not indicating that it exists and thus it would not have a chance in that situation to be rechecked on a hundred-percent followup.

[115]

Q. When one is suspected where there is an ap-

pearance that there was no one in what you consider to be a possibly occupiable unit, how did the enumerator verify the status as vacant?

A. Basically we tried to identify someone who was knowledgeable, hopefully the owner or the realtor that was handling the unit, or — if there were indications of such, discuss, talk to the neighbors to identify what the situation of the unit was so we could verify with someone specifically that the unit was either occupied or vacant.

At the end of the first phase of the census, Followup One, we had a number of units that we classified as unclassified units, because we had identified the housing units existed but we were unable to determine at that point in time as to whether that unit was occupied or vacant, and if occupied how many people lived there.

Q. Was the Census Bureau, under its regulations and rules that it had, able to make any kind of estimate about whether there was someone there as of April 1, 1980, or whether it was vacant?

A. We do not deal in estimates when we take a census, and our people were instructed that they had to make a determination specifically by making a contact with someone, they could not just simply say, "Well, I think it's unoccupied" and mark it as vacant. One of the reasons they could not do that is

they had to turn in a census questionnaire and on that questionnaire not only do they collect information about the people that live there but we also collect information about the nature of that housing unit, num-

ber of rooms, and this type of information, which generally cannot be obtained through observation from the outside.

Q. So even with a vacancy the enumerator had to make a base or find additional information besides whether there was someone there or someone was not there?

A. Right, and if they could not they were to classify the unit as an unclassified unit, so we could attempt in the second phase, Followup Two, to again identify the existence of people in that unit or not.

Q. Okay. So in this process then you had to mail out and — you had the mailout and mailback, correct, and you have identified those addresses from which you have not received a questionnaire?

A. Correct.

Q. And you make the initial contact in Followup One to each vacancy, is that right?

A. Well, to each housing unit that we do not have a questionnaire. At that point we would not have known whether the unit was vacant or occupied.

Q. And if they find someone there who did not return a questionnaire, or had not received one, what does the enumerator

|117|

do?

A. The enumerator obtains the interview from a qualified member of the family at this stage of the game and he gets the census information and a complete questionnaire.

Q. Does that result in a further narrowing down of the vacant units?

A. Yes, it does, because that unit would be recorded in the address register to — indicating that it was an occupied unit and showing the number of people living in that unit.

Q. All right. And then Phase Two Followup is a different enumerator going to the remaining vacancies that are listed?

A. The different enumerator going back to all vacancies that were recorded on Followup One.

Q. All right.

A. In other words, if an enumerator in Followup One had reported a dozen vacancies in an E.D., that would be indicated on the address register as a vacancy. We would assign a new interviewer, a different interviewer I should say, an experienced one hopefully in most cases, to go out and actually recheck, identify from someone again that that unit really was vacant. If they did find that it was occupied on April 1st, 1980, then they were to conduct an interview.

Q. So, in other words—

MR. CERRONE: Excuse me, Your Honor, I apologize for

* * * * *

[119]

concerning what steps the Census Bureau would be taking?

A. Yes, there was. A series of mailouts were made beginning, I believe, back in February of 1979.

Q. Did that at that time explain what was called

the Local Review Program?

A. Yes, it did.

Q. Could you just briefly explain what the Local Review Program is?

A. Okay. A Local Review Program initially was the program in two phases that wold have been administered at — the first phase being administered in February of 1980 prior to census day. And the second phase after the Followup One operation that I have described. The original publications that were sent out dealt with the participation of the local jurisdiction in this program, emphasis was placed on being able to relay or relate their data, the jurisdiction's data, to a level that would be consistent with the data that we would provide that jurisdiction on the Local Review Program at the end of Followup One.

That program did change with a letter from the Director of the Bureau, Vincent Barabba, that because of financial restrictions and timing restrictions the program became a single-phase program that was to be administered at the time of Followup One, and which was the situation that was carried out.

[120]

Q. Do you know whether or not the Local Review Program was created by or required by federal statute?

A. No, it was not. It was an effort by the Bureau to try to be responsive to, in my understanding, to concerns that local jurisdictions had expressed after the 1970 Census that they desired to have some input into the census operations.

Q. Likewise are you aware of whether or not any regulations requiring your undertaking the Local Review Program?

A. No, there are not.

|WHEREUPON, Mr. Cerrone entered the courtroom.|

Q. Do you know, Mr. Ellwanger, whether or not the purpose of the Local Review Program was to recheck the entire census?

A. It's stated in the Local Review Program booklets that that is not the purpose of the program. It is a program that's to help improve the coverage of the 1980 Census but not intended to redo the census.

Q. And do you know whether or not the Local Review Program brochure that was initially sent out to the city so indicated what the intent of that program was?

A. Yes, it did.

Q. All right.

MR. CRABTREE: May I have just a moment, Your Honor?

THE COURT: Surely.

MR. CRABTREE: I'm trying to show counsel the exhibits.

|121|

Q. |By Mr. Crabtree| Mr. Ellwanger, let me show you what's been marked for identification purposes as defendants' exhibit C and ask whether or not you can identify that booklet.

A. Yes, I can.

Q. And what is it?

A. It's a technical guide to the 1980 Census Local Review Program.

Q. And is that the brochure which was initially sent out to municipalities regarding the Local Review Program?

A. I believe this is it. I believe this is the second

brochure that was sent out but it is one that was sent to the jurisdictions.

Q. And is this an official publication of the Bureau of Census regarding this program?

A. Yes, it is.

Q. And do you know whether or not that brochure indicates then what the purpose of the Local Review Program was?

A. Yes, it does.

Q. And do you see that inside—

MR. CERRONE: Your Honor, I would object to the line of questioning in that the exhibit hasn't been admitted into evidence as yet.

THE COURT: All right.

MR. CRABTREE: I merely asked him if he sees the inside, I don't want him to read it at this time.

* * * * *

[128]

raising those as a concern to us.

Q. And did you have occasion to assign anyone in your — under your supervision to conduct a spot check on these contested vacancies?

A. Yes, after a meeting that was held on August 18th, in which additional concerns were raised about the vacancy rate, and at the time that we were notified of the city's on-going recanvass of the areas to identify vacancy units I assigned Catherine Busler of my staff, who is a regional technician, to check out the original list of vacancies, vacancy rate problem E.D.'s. Basically there were three E.D.'s that had a very large vacancy rate percentage, and we had staff members actually physically recheck those a third time.

The other E.D.'s, which I think numbered somewhere around 15, or so, we actually did a check in the

office to identify the type of units that we had as vacants to see if there was any possibility that we did have a problem with the vacancy rate in those particular E.D.'s.

Q. All right. So with respect to vacancies, though, you did do a — basically a third check of specific identified problems that were given to you by the city?

A. Yes, we did.

Q. Could you just briefly indicate how you were defining a vacancy again?

A. Okay. Well, as I stated, we have serveral categories

* * * * *

[149]

A. That that was that high compared to what we had started with on the local review, which was approximately 455,000.

Q. All right. At that point in time, when you provided the preliminary figures, your census was still ongoing?

A. That's correct.

Q. As a result of the Local Review Program, has there been any change in the population figure for the City and County of Denver, Mr. Ellwanger?

A. Yes, there was a small change. There has been, it's obvious from the figures I just mentioned, where the preliminary figures were 455,000 and we are now at 491,000 plus, there was a major change in the figures. But from our records on local review we were able to make a determination that the result, specifically of local review, was the addition of 293 housing units and 504 people to the counts for the City and County of Denver.

Again, this was directly related to the Local Review Program, and this would be as a result of comparison of housing unit differences. We also added 106 people in our Lakewood office, that portion of the city that belongs to Denver, as a result of boundary problems that we had on the original maps, and with the original data, we had boundary lines in the wrong place and had credited 106 people to Lakewood when they, in reality, belonged to the City and County of Denver.

[150]

Q. Now, through this local review process, did you identify areas which both, on one occasion, would increase the population or housing counts, and, on the other hand, possibly decrease it?

A. Yes, we had many situations, many situations where we were able to determine that our figures were correct. For example, a number of enumeration districts we identified the reason why the city had a higher housing unit count was basically because they had identified a couple blocks, or a block or two here and there within that enumeration district that did not exist. In other words, the data, the figures they had given us belonged to a different enumeration district than the one that was being challenged.

Q. Now, you said that was 504 people, and what was the total final census?

A. The final population count?

Q. Yes.

A. I believe it was, as it stands right now, 491,651.

Q. And that's the number that the Census Bureau is prepared to certify as the correct population for the City and County of Denver?

A. That's the number that will come out in the next publication of the data, which is called the Final Preliminary Count. Those — that number could change as a result of the processing operations prior to when the numbers have to be

* * * * *

[157]

what you would anticipate would be required?

A. I would think so, yes. Probably more time than that from the standpoint that we would have to, of course, hire 330 people, or whatever it would take at this point, where we did the original operation we had people on staff that were available to fill those positions.

MR. CRABTREE: All right. No further questions. Thank you.

THE COURT: All right. Thank you.

Cross-examination.

CROSS-EXAMINATION

BY MR. CERRONE:

Q. Mr. Ellwanger, you indicated that you were responsible, as the Assistant Regional Director, for supervising seven states, is that correct?

A. That's correct.

Q. What is the approximate population of the people in the seven states, in the seven states that you are responsible for?

A. I really don't know what the answer is. I can tell you what states they are.

Q. What states are they?

A. Arizona, New Mexico, Colorado, Oklahoma, South Dakota, Nebraska and Wyoming.

Q. And you are responsible for the supervision of all of

[158]

those seven states?

A. The operations for those seven states, yes.

Q. And you are responsible for knowing what should be going on in those seven states?

A. That's correct.

Q. And in those seven states, is it really possible for you to personally supervise or personally see what's going on?

A. No, it is not.

Q. In other words, you have to make a lot of assumptions that what is supposed to go on is going on?

A. I have to delegate a lot of activities to people under me that can provide me with the information to insure that a census is being taken properly.

Q. You don't have any personal knowledge as to whether or not what is supposed to have been done was really done?

A. Not a direct personal knowledge, no. I did not supervise any of the enumerators.

Q. Mr. Ellwanger, you indicated that there was a dress rehearsal in 1978 in the LaPlata and Montezuma—

A. Counties.

Q. —Counties, and as a result of that dress rehearsal you determined what you were going to do on the City and County of Denver, or in the metropolitan area?

A. No, that's not true. I was involved in that activity and that was a dress rehearsal of how a census would be taken.

* * * * *

to check out three enumeration districts, is that correct?

A. That's correct.

Q. But you didn't check — would you describe again, please, how she made that check.

A. She sent enumerators out to verify the accuracy of the first and second reporting of the units being vacant.

Q. She did that herself?

A. No, she did not.

Q. She sent enumerators out?

A. That's correct.

Q. The very same enumerators we have been talking about?

A. Not necessarily. It could have been—

Q. Not the same persons but the same group of people?

A. I would assume so, yes.

Q. And you only did that in three enumeration districts?

A. That's correct.

Q. And this is what you are constantly referring to as the third check?

A. That's correct.

Q. Only three enumeration districts. How many enumeration districts are there in the City and County of Denver?

A. I believe there is basically 670 something, I'm not sure of the exact number.

Q. And did you check any other enumeration districts as a result of this information?

[182]

A. No, I did not.

Q. And you went out and checked three with enumerators and found what?

A. We found no difference in the original count.

Q. In three enumeration districts?

A. That's correct.

Q. Mr. Ellwanger, you went into a long line of testimony regarding categories of housing units that may be vacant, you indicated that some of them were just not there, people just not there, and some were based upon the use of the unit, seasonal, occasional, I'm not sure what else; how do you determine that?

A. By making contact with the individuals that might be there at that point in time, or by making contact with a realtor or finding out who the owner is or identifying it through a neighbor.

Q. How many of them are there in the City and County of Denver?

A. I really don't know. I know from testimony earlier there were 16,600, or something, was mentioned as the vacancy figure. I don't know what the breakdown of those are.

Q. Do you remember the testimony of Mr. Licht to the effect that in one-third of the city there were only 300 units under construction?

A. I was here during the testimony. I don't remember

* * * * *

[188]

A. I'm aware from the preliminary working figures, yes.

Q. What is it?

A. I believe it was 2.2 something, or something to that effect.

Q. So for every unit you find that's not vacant, that it's occupied, it's likely that there will be 2.2 people in it?

A. No necessarily.

Q. Let me see—

A. Average.

Q. On the average?

A. I don't know. I can give you an opinion. My opinion would be that in the units that were added as a result of the second followup, on converting unclassifieds, I would say we are probably looking at a smaller per household than we would on the average, because basically one of the reasons why you have a difficult time finding or enumerating the unit, identifying what it is, is the fact that if you have a single-person household, or if you have a married couple, that it's more difficult to find them at home than it would be with someone who has a family. But that's again just my opinion and my knowledge of what happens on a census.

Q. Is it more difficult to take the census or enumerate persons in the core city than it is on the fringes?

A. In most circumstances, yes.

Q. And, therefore, isn't it more difficult to determine

* * * * *

[204]

Q. What is your business address, Mrs. Busler?

A. 938 Quail Street.

THE COURT: Would you speak a little more loudly, please, because you are aimed in his direction

and I've got to hear it, unless you want to just speak into the mike. You might—

A. 938 Quail Street, Lakewood.

Q. [By Mr. Crabtree] What is your present occupation?

A. I'm a Regional Technician for the Bureau of the Census.

Q. And how long have you been employed by the Bureau of the Census?

A. Five years.

Q. Who is your supervisor, Mrs. Busler?

A. Mr. Ken Ellwanger.

Q. And do you have some people that you supervise in this capacity?

A. Yes.

Q. And have you been involved in the 1980 Census for the City and County of Denver?

A. Yes.

Q. Which office are you in here?

A. I'm a liaison between the Regional Census Center and the Lakewood District Office and the Denver District Office.

Q. Did you have occasion to undertake a specific

* * * * *

[207]

to the fact that we recanvassed and no changes were made and the Planning Board accepted our figures.

Q. Did you have an occasion to have challenges with regard to vacancies?

A. Yes, I did.

Q. And how many enumeration districts were involved there?

A. There were 18.

Q. Out of how many?

A. 18.

Q. Out of how many enumeration districts?

A. In addition to the 85.

Q. But the 18 were on vacancies, correct?

A. That's correct.

Q. And how many enumeration districts were there in the Denver City and County?

A. Oh, out of 681.

Q. And they presented challenges to you on 13 of them.

A. That's correct.

Q. And did you make an effort to resolve those differences?

A. Yes, I did.

Q. What was the process that you undertook?

A. Okay. On five of those enumeration districts I sent out a supervisor and an enumerator.

Q. Was that an experienced enumerator along with the—

[208]

A. Yes, these were our very best enumerators that we retained along with the very best crew leaders and one field operation assistant.

Q. Let me just get the chronology right here. Had the mailout/mailback Phase One Followup and Phase Two check already been done?

A. Yes.

Q. And now you were doing just a spot canvass of those—

A. Yes.

Q. —E.D.'s?

A. Yes.

Q. Okay.

A. They had targeted three E.D.'s about which they were specifically concerned, and so I had our best people check those. And then in looking at the address registers I found two others that I thought merited field checks, and so I checked five of those.

Q. All right. What about—

THE COURT: Excuse me. You said the city challenged three and you found two more and then you said you had checked five—

THE WITNESS: They challenged 18 altogether, Your Honor, but there were three that they targeted as a special concern.

THE COURT: And you checked those three and then you checked

[209]

two additional on your own?

THE WITNESS: Of the additional ones in the field, I checked all the 18.

THE COURT: I just want to make sure five is the total number and not five plus.

THE WITNESS: I checked all 18 but five in the field.

Q. [By Mr. Crabtree] How did you check the remaining? So that would have been 13.

A. Yes. By looking at the address registers and making notes of the comments that were in the remarks column concerning the reasons for the vacancies.

Q. And did — and based on that you were satisfied that that was all that—

A. Yes, because we were not required to recanvass any of those.

Q. Now, with respect to the three that the city specifically identified for you, you sent out a supervisor and an experienced enumerator?

A. Correct.

Q. Based upon that canvass, Mrs. Busler, what was determined with regard to the discrepancy? And without getting into the addresses or the names of the people involved.

A. Okay. On one E.D. their reason for challenging was stated that this was one of the most successful real estate ventures in Colorado and they saw no reason for there to be

|210|

vacancies. The report that was returned by our people, having talked to two managers, both the manager and the assistant manager at this particular complex. There were 73 vacancies there as of April 1st, which was what we had reported originally. These vacancies were due to the fact that some of them were corporate units which were held for occasional use only. Some of them had been — had auctions put on them and were not sold and were not occupied. Some were just not sold. But they showed us their records and gave us numbers of units which were vacant on April 1st.

Q. That was one of the areas—

A. That was one.

Q. —that the city has specifically targeted?

A. Right.

Q. All right.

A. Another one that was specifically targeted was a unit, or a specific building in which we had re-

ported 23 vacancies in an E.D., and the build — and they had given us a building number in that E.D. which they questioned.

Q. The city had?

A. Yes. And when we went to that building we found that it had been converted to an office building two years ago and there were no units in it. And that was the only one that they were complaining about.

Q. All right.

|211|

A. Okay. On a third one they were complaining about 78 vacancies that we had reported and when we went to this address we found that it was a building owned by the Denver Housing Authority, and the Denver Housing Authority had moved everyone under the age of 62 out of this building prior to April 1st.

Q. All right. And that resulted in the 78 vacancies?

A. And those were the 78 vacancies which existed on April 1st.

Q. And that was again confirmed and verified on recount?

A. We talked, yes, we talked to the manager and there were a few people that lived there over the age of 62 but it was being converted to an old people's home. And the balance of the residents had been moved out prior to April 1st. And that was the third one.

And the fourth one was an address they gave us which was a burned-out building, which that would have been a definitional difference. We still considered it habitable and they obviously did not.

Q. But on recheck there were still no people to be found in that building?

A. No. But we considered the unit, or units, vacant and they considered it demolished.

The fifth one I checked out was one that they had reported to us as having heard that there were only four

[212]

vacancies in the building. And we went and talked with the manager of that building who told us that as of April 1st there were 34 vacancies and she gave us the apartment numbers which were vacant on April 1st.

Q. All right. As a result of your check and canvass of those E.D.'s specifically targeted by the city, did that result in any change in the population or number of vacancies?

A. No.

MR. CRABTREE: May I have just a moment, Your Honor?

THE COURT: Yes.

MR. CRABTREE: No further questions.

Thank you.

THE COURT: All right.

Cross.

CROSS-EXAMINATION

BY MR. CERRONE:

Q. Ms. Busler, are you aware of the basis upon which each of the comments were provided by the city?

A. I have the memo that was given to me with their typewritten comments, yes.

Q. And when; what date was it that they gave you those—

A. This material was given to me on August the 6th.

Q. And when did you give them your figures, or your preliminary data?

A. I gave them information on August the 7th.

* * * * *

[220]

but the double vacancy check was tested in those areas.

Q. Now, you indicated in your August 28th letter that an additional check would have little or no effect on the vacancy rate in Denver. What was the basis for that statement, Mr. Schilling?

A. I think my knowledge of the accuracy of the double-checking procedure, and also the fact that there were definitional differences between the procedures that were used by the city and our procedures.

Q. At that point in time, on August 28th, were you aware of the methodology or correspondence that indicated the methodology that Denver had used?

A. Yes, I was.

Q. And did you consider that, in your decision, to not reconduct a third time a vacancy check?

A. Yes, I did.

Q. What about that methodology, Mr. Schilling, that caused you not to redo the census?

A. Well, I think it just is not consistent with ours. We are comparing two different things, and it's obvious to me that our vacancy rate would be higher because of the way we treat certain types of housing units.

Q. Did the Census Bureau's process use any — utilize any estimate?

A. No.

[221]

Q. And what did you see about Denver's methodology?

A. Well, there were a number of things, where a clear determination was not made, and the procedures called for a person to determine that unit to be occupied.

Q. Did you see any indication in the data supplied to you that Denver had made even an initial check of all units?

A. I'm not sure I understand the question.

Q. Did you see any indication that Denver's data indicated that they had contacted even on one occasion each unit?

A. No. I did not look at their data, just their specifications, and so on. I did not make the decision based on reviewing their data.

Q. Were you aware at that point in time that it was based on an estimate of only a portion of the population?

A. Yes.

Q. That was the point I was asking you. Maybe I wasn't clear.

A. Yes, I was aware of that.

Q. You indicated a definitional problem, can you amplify on that a little bit?

A. Well, I think the primary things I set forth in my letter, and one is that the units that are under construction with the doors and windows in place, where the unit is protected from the elements, are counted as vacancies by our definition, they are not by the city's survey.

[222]

And, secondly, a person with a usual residence elsewhere, if they determine that the other residence, the one not in Denver, is their usual residence, then we would have a vacancy here even though that person is — was currently in the unit as of April 1.

Q. And that appears to vary from the definition of the Census Bureau?

A. That varied from the city's survey definitions.

Q. Based upon the Local Review Program, Mr. Schilling, did that indicate that there had been any significant change in the population numbers?

A. No. As I understand it, the Local Review Program added a fairly small number of people to the census results.

Q. Mr. Schilling, during Mr. Ellwanger's testimony, the undercount percentage was brought up and mentioned at 2.5, are you familiar with that factor?

A. Yes, I am.

Q. And how was that determined and utilized?

A. Well, the Bureau of the Census does a number of evaluation studies on their own work, and at some point after the 1970 Census they provided this figure. It was based on a number of studies that were put together to come up with a final estimate.

Q. So that if it were to be suddenly utilized by the Bureau and applied to, say, a city, would you be required to

[223]

apply it to — across the board, say, 2.5 for Denver, 2.5 for Lakewood?

A. Well, it's a national estimate. We don't attempt to apply it locally. And so the use of that 2.5 figure is simply that we count — undercount the nation by 2.5 percent.

Q. Basically did that apply — if you fairly apply it it would apply to every place, to Denver and Lakewood and to Colorado and New York, right?

A. Yes, that would be typical.

Q. So that to apply it to each place would basically result in a wash?

MR. CERRONE: Your Honor, I object to the question in that it's asking for a conclusion, that is, that by adding 2.5 percent to everyone's figure the result is going to be the same and I don't think that the witness is qualified to testify to that. When we are asking with respect to that result the distribution of Representatives in Congress, and so forth, what that additional 2.5 percent is going to do is, I don't think, within the competency of the witness.

THE COURT: Since I've got to decide this, maybe I will ask a question to try to clarify.

Is there some special magic significance or magic difference between 491,000 and 500,001 of the population figure for the City and County of Denver? What is it if there is?

* * * * *

|234|

A. We did not have any procedures for tabulating that kind of information at the local ||level, that will all be done by the computer.

Q. And these are the kinds of data, these are the kinds of information that influenced you to make your decision not to consider the City and County of Denver's data?

A. That's correct.

Q. You don't know what they are; you don't know what they are?

A. I do not know the number of U.R.E.'s in Denver.

Q. Mr. Schilling, in your opinion, did the Bureau of the Census count everybody in the City and County of Denver?

A. I think the Bureau of the Census did the best census that they could do in the City and County of Denver. There will always be an undercount, so the answer to your question is, "No, we did not count everybody."

Q. And do you have any idea what the magnitude of that size of persons who were not counted?

A. No, I do not.

Q. You don't have any estimate?

A. No.

Q. You have no opinion?

A. No.

Q. But the size of the undercount in 1970 was 2.5 percent?

[235]

A. That's correct.

Q. Is it likely that 2.5 percent now—

A. I think there is an excellent chance that we will do as good or a better census than we did in '70, but I can't say that I am positive.

MR. CERRONE: I have no further questions, Your Honor.

THE COURT: All right, Mr. Cerrone.

Any redirect?

MR. CRABTREE: No, Your Honor.

THE COURT: All right. You may step down, Mr. Schilling.

[Witness excused.]

MR. CRABTREE: We have no further witnesses to call. And subject to all our exhibits being admitted, I think they are, we would rest.

THE COURT: All right.

Assuming they are all admitted, and if they are not admitted, check overnight, please, and ask for permission to reopen the evidence for that purpose. And that can apply to both sides.

Do counsel feel the need to make closings?

MR. CERRONE: Your Honor, I would like to make a few comments if I may.

THE COURT: All right.

MR. CERRONE: Your Honor, the City and County of

[236]

Denver is the plaintiff in this matter and is before the Court requesting immediate relief. We are requesting, first of all, the Bureau retain the records in the City and County of Denver which pertain to the 1980 Decennial Census.

We are asking, requesting, Your Honor, that the Court allow Denver access to these records under the following conditions: That the use of those records are for only those purposes concerning the census; that the persons who have access to this information be sworn by the Director of the Bureau, or his delegate, to confidentiality under 13 U.S.C. 23(c); and that the Bureau edit, or cull, the data, which I understand they refer to as F.A.R.'s, without any reference to the persons who provided the information or any sort of data which may

be, in their opinion, deleterious or contrary to law.

However, Your Honor, obviously C and B, my second and third condition, are quite closely related in that I submit that the persons who should be looking at this shall be sworn to confidentiality in the same way that the Bureau personnel are under the same stringent requirements, under the same penalties of law, et cetera.

Additionally, Your Honor, the city is asking the Court to order the Bureau to actively cooperate with Denver in verifying the vacancies. As it was pointed out in the hearing, it's going to be just absolutely untoward if we are simply allowed to use their lists and go out and look at these units

[237]

and come back with a figure that's different than theirs. And there is going to be two opinions, and then there will be three opinions. I think the only workable thing, Your Honor, is for there to be cooperation. The City and County of Denver is ready, willing and able to provide manpower in this cooperative effort, for however long it takes, and, Your Honor, we don't believe that it's going to take that long. I think the testimony is to the effect that it's going to take two to three weeks. I don't think anybody really has a good idea of that, but I don't think it's going to be that long.

And, lastly, Your Honor, we are asking the Court to enjoin the Bureau from using the present population figures that it does have. And, Your Honor, the City and County of Denver is well aware of the fact that by doing so this information is not going to be transmitted, or it's already been transmitted, it's going to cause some sort of problem down the line timewise. But, Your

Honor, the City and County of Denver is convinced that the rights that we are pursuing, particularly the one man, one vote, and a represenatational right, is absolutely too great, too important to be offset by any consideration of time and money.

I asked one of the witnesses, and it really wasn't necessary, to tell the Court when this data, in particular with respect to apportionment of the House of Representatives, is really going to become important; it's going to become important

|238|

at the next election. Now, I'm not naive to believe that that figure is just going to pop up on November 3rd, or whatever it is, two years from now, and it's going to be determined before that for a number of different reasons.

But what I'm trying to say, Your Honor, is that whereas January 1, 1981, is a very important date as set forth in the statute, and so forth, that that is not an immunable date, and this Court has the power and it must exercise its power to do whatever is necessary to make sure that the rights of the people of the City and County of Denver are protected.

Very quickly, Your Honor, and I'll try not to take too much time, I think that the City and County of Denver has met its burden in this hearing with regard to a preliminary injunction with respect to the irreparable injury, and balance of the equities, and the public interest, and, yes, Your Honor, the status quo, because the status quo, as the Court knows, is the status quo, if the Court doesn't stop it, this machine is going to roll on and the machine, of course, is the Bureau.

Very quickly, Your Honor, the issue of exhaustion has been raised but I don't think it's been seriously raised in view of the fact that the Court has de novo responsibility, and also in view of the fact that the Bureau considers the rationale or the reaons for its denial of the city to be statutory, so, therefore, there is no discretion.

[239]

We are not asking for ultimate relief, Your Honor. The ultimate relief we are asking in our Complaint is that we be given more population. Your Honor, I would point out the first prayer of our Complaint asks the Court to expedite this matter in every way, to advance it on its docket, and, Your Honor, the city would maintain that includes — that that includes, and I'm sure it understands that all this was done in a very rushed fashion, the consideration of the Court of considering this preliminary injunction hearing a combination with the permanent injunction hearing. Because, quite frankly, I don't really feel that after — in the event that we get the relief that we are seeking and in the event there is cooperation with the federal government and the city, that there is really going to be a need for a permanent injunction.

Your Honor, I'm not going to recite the brief that our — repeat the brief that the city has submitted in this matter, but I feel very obligated to just mention very quickly that there are a number — no provisions with the — 13 U.S.C. 9(a) that would apply to the matter. We are not going to use this information for purposes other than the census, we are not going to publish it, we don't want to look at the individual questionnaires and reports.

Your Honor, the city has submitted supplemental authorities to the Court, rather than submitting them into evidence I — it's more proper to submit them as additional authorities.

|240|

These authorities are in the form of, all we have at this moment, Your Honor, two orders, one of the District Court of New Jersey, the State of New Jersey, and the District Court for the Southern District of New York, both of which allow disclosure of this data to those particular cities.

THE COURT: Do you know of any authority to the contrary?

MR. CERRONE: Your Honor, the only authority that I am aware of contrary to it is the case of *Seymour* vs. *Barabba* 559 Fed. 2nd 806, D.C. Circuit, 1977. And in that case, Your Honor, Mr. Seymour, the plaintiffs were seeking the information of the Bureau in order to conduct or construct a list for a class action, civil action, and the Court ruled that since the plaintiffs were not seeking the information for purposes of the census that it was not to be allowed.

And, Your Honor, we have no quarrel with *Seymour*, we have quarrel with expanding *Seymour* to what we have here, which is not a use for the making of a list for a class action, not for any other personal purpose, but for the purposes for which the data was collected.

And, Your Honor, we feel that the safeguards, which were employed in both of those cases, namely, the swearing in of employees at the city to the same confidentiality requirements of the Bureau's personnel, as well as the fact that they shall be used only for the census, protect the census.

|241|

I must point out to the Court, I am obligated to point out to the Court, that both of these orders were issued under Rule 26 (c). It's apparent that I am requesting the same or similar relief as a preliminary injunction matter. Your Honor, I don't feel that form should govern over substance. In the event that we are required to make such a motion, in order to fit us four square into those two cases, the city will make such a motion and hope that the Court accepts my oral motion at this time for expedited discovery of these matters.

Your Honor, I think that the city, as I have indicated, has shown a high risk of success, we have shown that the Denver Regional Council of Governments' figures, which are used by the federal government, the procedures which have been funded by the federal government, show that the figures that the Bureau of the Census has come up with the 1980 Decennial Census are suspect.

I think that the other kinds of things which the city has been convinced by — by which the city has been convinced that it has a complaint, namely, the information that we have regarding water and sewer taps, telephone data, the other kinds of things that Mr. Sullivan testified to regarding food stamps, the Board of Realty, building permits, assessment records, information from the Governor's office, the post office, the telephone company, all of these things, Your Honor,

|242|

are telling us the same thing. I don't know whether or not they are all out of — march to the drum of — to the beat of a different drum, or whatever, but they all tell us the same thing.

The irreparable injury, I think, is apparent. Mr. Sullivan has indicated that the representation of the City and County of Denver, of the people of the City and County of Denver is going to be affected as well in the United States Congress as the State Legislature, and that state and federal funds which are allocated on the basis of population shall be reduced. I don't think there is any question as to the public interest that the City and County of Denver is here to propound. And I think that the balancing of equities, Your Honor, is apparent.

We are talking about Constitutional and statutory rights versus time and money.

Unless the Court has any questions, Your Honor, the city would stand on the closing argument and our brief that we submitted to the Court.

THE COURT: All right.

I don't suppose there is anything further in any of these two cases as to which you furnished other than in Law Week or otherwise, because they are both too new.

MR. CERRONE: Your Honor, we got that Friday afternoon.

[243]

THE COURT: All right. Okay, thank you, Mr. Cerrone.

MR. CERRONE: Your Honor, I must say, though, I thoroughly anticipate that the Justice Department is going to appeal, at least the New York one is. The New Jersey one is so old, though, I really don't know what's happening there.

THE COURT: All right. Thank you.

MR. CRABTREE: Your Honor, the defendants have submitted a brief in opposition to the plaintiffs'

motion for summary judgment in which we discuss at some length the requirements set forth by the Tenth Circuit Court for the granting of a preliminary injunction, which has been pretty well established in this Circuit. I won't repeat those, other than to point out that I think one of the real problems here is the city in this case, unlike the direction which the other cases in New Jersey and New York have gone, the city here chose to pursue this case by means of a preliminary injunction hearing, after the defendants agreed some time ago that they would maintain those records. We must then evaluate what the city wants in light of what the test is for the granting of preliminary injunction relief.

It has been stated and restated—

THE COURT: Let me just ask you—

MR. CRABTREE: Yes, Your Honor.

THE COURT: —would you object to our considering this on the merits as if it's also submitted on the contested

* * * * *

[247]

checking the only ones on which there is disagreement, and that would be far fewer and it would take a lot less people and a lot less time. I can't, for the life of me, frankly, see why anybody's privacy is invaded by the remedy which is asked, which, if you swear people, keep the same secrecy that the Bureau is keeping, and you don't give those people anything but an address which the Bureau claims is a vacant address.

MR. CRABTREE: It wasn't a vacant address as of — it was a vacant address as of April 1.

THE COURT: As of April 1. And they go together, one city employee and one Bureau employee, and find out as of April 1 that was or was not a vacant address,

it seems to me that everybody is better served in the public interest. You have a census and the city's not in a position to complain any more that they are being unfairly treated if they don't get proper allocation that they now seek of Congress people, and State Legislators, Senators, Representatives, allocation of federal funds, and so forth.

And I'm very sympathetic with your client because he's sort of in a trap. He sees the law as requiring him to make this ruling, but I sense he's a cooperative person. And is it possible that there is a General Counsel's office that can give a ruling on that?

MR. CRABTREE: Your Honor, I might indicate that at the time I wrote my brief and took the position that I

[PLAINTIFF'S EXHIBIT #2]

[From the Mayor's Office, City and County of Denver]

August 25, 1980

Mr. Leo Schilling, Regional Director
Bureau of the Census
938 Quail Street
Lakewood, CO 80215

Dear Mr. Schilling:

In a meeting with Mr. Ken Ellwenger, Mr. Gordon Ashley and others of your staff on August 18, 1980, several points were raised that we formally request be addressed in the Census Local Review Program as part of our official challenge of August 1, 1980 and amended on August 14, 1980 where we challenged the excessively high vacancy rate.

We have offered, as part of the local review process, to furnish you our back-up data which included the addresses of vacant units, and owners' names as of April 1, 1980. This was explained in the methodology furnished you as done by our Assessment Division which challenged your vacancy factor. The response was verbal and negative to our offer, and that response by Mr. Ellwanger was to the effect that you did not have the budget allowance to use our data to compare to your list of vacant addresses. We hereby formally request that our data be used in determining a true vacancy factor.

We also formally request that you furnish us with the addresses of living units you believe were vacant on April 1, 1980, so that using our resources we can determine the validity of your data which our data shows to

be in error. We do not feel the address of a unit you say was vacant can be construed as confidential since it goes to the very essence of this undercount problem.

As of this date, we have reviewed in the field on a door-to-door basis over 43,000 living units. The results of that review indicate your vacancy rate is over 41% higher than the actual number of vacant units.

This material difference is critical to the future of this City in distribution of State and Federal aid. Based on your preliminary count furnished us and the present grant formulas, we would stand to lose approximately $35 million over the next 10 years.

In addition to the two formal requests outlined above, we also formally request that the Lakewood and Denver District offices be kept open until this question can be resolved on the vacancy factors. Please respond in writing by Thursday, August 28, 1980.

Sincerely,

/s/ W. H. McNichols, Jr.
Mayor

cc: Mr. Ken Ellwenger
Mr. Gordon Ashley
Mr. Alan Canter

[PLAINTIFF'S EXHIBIT #3]

[From the U. S. Department of Commerce, Bureau of the Census, Regional Office, Denver, Colorado 80225]

August 28, 1980

Honorable W. H. McNichols, Jr.
Mayor, City and County of Denver
City and County Building
Denver, Colorado 80202

Dear Mayor McNichols:

This is in response to your letter of August 25, 1980, in which you expressed concern about the Local Review Program housing count vacancy rate.

As you know, these figures represent the counts and status of housing in Denver at the completion of the first phase of the census enumeration. Each housing unit classified as vacant during this initial phase has subsequently been rechecked by a different enumerator to insure that the unit really was vacant on April 1, 1980. If, during this recheck, the vacancy classification was found to be incorrect, then the occupants of the unit were enumerated and added to the census count. Our experience in several census tests and dress rehearsals shows that this 100 percent check of originally reported vacant units results in an accurate count of vacant units.

Differences between local estimates and the census vacancy counts provided in the local review data can occur for a number of reasons. Definitional differences are a major source of such differences. For example, housing units under construction but with the interior

protected from outside elements are classified as vacant in the census, while local vacancy estimates frequently do not include housing units under construction. In addition, housing units occupied by persons with a usual residence elsewhere are classified as vacant by census definition. They are seldom included in local vacancy estimates.

The Bureau of the Census has devoted considerable resources to achieving an accurate count of vacant housing units in the 1980 Decennial Census. The result has been the most accurate measure of vacancy status that could be reasonably accomplished. Additional checking at this point in time would, in our opinion, have little or no effect on the census vacancy rate for Denver city and county. We are, therefore, proceeding with scheduled plans to close the Lakewood district office on August 28 and the Denver district office on September 5.

We cannot comply with your request that we furnish you with address lists of units vacant on April 1, 1980. Census address lists contain confidential information, such as house numbers and street addresses, and are subject to the Bureau policies and procedures governing the handling and safeguarding of confidential materials as prescribed in title 13, United States Code, section 8 and 9.

I would like to take this opportunity to express our appreciation for the excellent working relationship we have enjoyed with Dennis Siglinger and Dave Turk of the Denver City and County Planning Office. The Local Review Program in Denver could well serve as an example of what we had envisioned in our highest expectations for this Program. Messrs. Siglinger and Turk

have, in our opinion, made a major contribution to an accurate census of the city and county.

Please do not hesitate to call on us if we can be of further service in this matter.

Sincerely,

LEO C. SCHILLING
Regional Director

cc: Mr. Vincent P. Barabba
Mr. Daniel B. Levine
Mr. Rex L. Pullin
Mr. Richard C. Burt
Mr. Kendrick Ellwanger

[PLAINTIFF'S EXHIBIT #7]

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* Denver Planning	No. of Units	No. Vacant	% Vacancy
		80	23.3
1763	343	~~85~~	~~24.8~~
1300 Ogden	*431*	*91*	*21.1*
	339		
	277		21.3
1847	~~285~~	59	~~23.0~~
1400 Humboldt	*273*	*21*	*7.7*
	274		
		59	22.2
2602-1731	266	~~48~~	~~20.8~~
1600 Pearl	*261*	*43*	*16.5*
	296		
	205		27.8
2000-1691	~~209~~	57	~~27.3~~
1300 Fox	*149*	*13*	*8.7*
	177		
	341	53	15.5
3702-1927	~~361~~	~~44~~	~~14.9~~
1400 Clayton	*338*	*34*	*10.1*
	339		
	311	25	8.0
2702-1749	~~337~~	~~50~~	~~15.2~~
1000 Lincoln	*275*	*5*	*1.8*
	303		
	227	78	34.4
2701-1747	~~225~~	~~84~~	~~37.5~~
1200 Lincoln	*226*	*7*	*3.1*
	223		
	582	46	7.9
4301-2016	~~437~~	~~42~~	~~12.4~~
800 Dexter	*545*	*24*	*4.4*
	566		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
4401-623 *1200 Wabash*	775 ~~677~~ *731* **793**	98 ~~92~~ *51*	12.7 ~~13.7~~ *7.0*
2702-1752 *900 Lincoln*	156 ~~154~~ *147* **119**	41 ~~39~~ *27*	26.3 ~~25.7~~ *18.4*
2802-1784 *100 Logan*	322 ~~319~~ *314* **309**	47 ~~41~~ *29*	14.6 ~~13.1~~ *9.2*
2802-1780 *200 So. Grant*	321 ~~326~~ *308* **317**	37 ~~31~~ *31*	11.5 ~~10.8~~ *10.1*
3702-1928 *1300 Detroit*	304 ~~305~~ *292* **284**	38 ~~42~~ *18*	12.5 ~~14.3~~ *6.2*
2802-1783 *100 Logan*	314 ~~316~~ *296* **314**	 ~~53~~ *21*	16.9 ~~17.2~~ *7.1*
2703-1772 *1000 Ogden*	362 ~~357~~ *352* **339**	42 ~~36~~ *31*	11.6 ~~10.4~~ *8.8*
2100-1695 *200 So. Elati*	269 ~~280~~ *244* **312**	49 ~~52~~ *20*	18.2 ~~18.7~~ *8.2*

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
2702-1755	256 ~~258~~	25 ~~27~~	9.8 ~~10.5~~
800 Logan	*274* **239**	*14*	*5.1*
2703-1764	323 ~~327~~	27 ~~28~~	8.4 ~~10.2~~
1200 Downing	*339* **313**	*24*	*7.1*
2703-1769	318 ~~324~~	30 ~~34~~	9.4 ~~11.2~~
1100 Clarkson	*288* **314**	*29*	*10.1*
2701-1736	302 ~~305~~	54 ~~53~~	17.9 ~~17.7~~
1300 Penn.	*300* **310**	*43*	*14.3*
2701-1738	269 ~~271~~	40 ~~48~~	14.9 ~~18.4~~
1200 Logan	*385* **269**	*104*	*27.0*
2701-1745	257 ~~256~~	35	13.6 ~~14.3~~
1100 Lincoln	*254* **324**	*52*	*20.5*
2702-1751	339 ~~337~~	48 ~~55~~	14.2 ~~16.4~~
900 Logan	*333* **339**	*28*	*8.4*
3102-1840	250 ~~273~~	20 ~~42~~	8.0 ~~15.9~~
1700 Gilpin	*293* **290**	*14*	*4.8*

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
502-1573	344 ~~339~~	37 ~~36~~	10.8 ~~10.8~~
2000 Meade	*271* **325**	*24*	*8.9*
3400-1877	326 ~~323~~	40 ~~37~~	12.3 ~~12.0~~
300 So. Gilpin	*359* **323**	*11*	*3.1*
3603-1913	289 ~~47~~	6 ~~5~~	2.1 ~~15.2~~
2800 Steele	*265* **266**	*3*	*1.1*
3102-1842	296 ~~297~~	40 ~~35~~	13.5 ~~12.5~~
1500 Gaylord	*333* **360**	*34*	*10.2*
600-1580	292 ~~290~~	43 ~~44~~	14.7 ~~15.4~~
2400 Federal	*289* **293**	*28*	*9.7*
3102-1838	296 ~~287~~	78 ~~62~~	26.4 ~~23.4~~
1900 Race	*328* **288**	*40*	*12.2*
2703-1767	241 ~~210~~	49 ~~21~~	20.3 ~~10.4~~
1200 Pearl	*221* **238**	*13*	*5.9*
3102-1843	348 ~~350~~	57 ~~37~~	16.4 ~~12.3~~
1600 Williams	*340* **278**	*26*	*7.6*

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
2802-1786 *100 Grant*	261 ~~260~~ *250* **246**	25 ~~30~~ *11*	96 ~~11.5~~ *4.4*
2701-1735 *1400 Grant*	306 ~~303~~ *370* **312**	37 ~~36~~ *58*	12.1 ~~11.9~~ *15.7*
2701-1737 *1200 Logan*	359 ~~355~~ *370* **369**	46 *66*	12.8 ~~13.0~~ *17.8*
2701-1744 *1000 Sherman*	288 ~~289~~ *292* **281**	47 ~~49~~ *39*	16.3 ~~17.0~~ *13.4*
3201-1846 *1400 Humboldt*	266 ~~274~~ *271* **269**	22 ~~26~~ *31*	8.3 ~~10.3~~ *11.4*
3202-1860 *1400 Race*	327 ~~330~~ *329* **308**	27 ~~33~~ *20*	8.3 ~~10.2~~ *6.1*
2701-1740 *1000 Pearl*	218 ~~216~~ *225* **224**	69 ~~70~~ *69*	31.7 ~~33.8~~ *30.1*
3202-1861 *1300 Race*	348 ~~349~~ *339* **327**	46 ~~50~~ *28*	13.2 ~~14.5~~ *8.3*

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
		27	10.1
3702-1924	267	~~28~~	~~10.6~~
1200 York	*267*	*27*	*10.1*
	258		
		193	24.2
8306-699	798	~~124~~	~~21.6~~
Montbello	*827*	*105*	*12.7*
	826		
	613	129	21.0
4301-2013	~~621~~	~~99~~	~~17.8~~
1100 Ash	*619*	*58*	*9.4*
	624		
	338	22	6.5
2902-1803	~~337~~	~~15~~	~~4.8~~
400 S. Pearl	*336*	*7*	*2.1*
	354		
	217		
3202-1863	~~218~~	40	18.4
1100 Race	*237*	*18*	*7.6*
	224		
	284	56	19.7
3201-1845	~~281~~	~~44~~	~~17.2~~
1400 Gilpin	*276*	*35*	*12.7*
	269		
		52	16.3
2703-1765	320	~~49~~	~~16.2~~
1200 Emerson	*308*	*28*	*9.1*
	318		
	374	37	9.9
3202-1859	~~371~~	~~40~~	~~11.0~~
1400 Gaylord	*383*	*34*	*8.9*
	352		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
		40	11.8
5103-2080	340	~~48~~	~~12.7~~
900 Lincoln	*340*	*3*	*0.9*
	340		
		52	15.8
2702-1753	330	~~61~~	~~18.6~~
900 Sherman	*318*	*30*	*9.4*
	311		
		37	12.3
3201-1856	300	~~38~~	~~13.2~~
1200 Marion	*291*	*30*	*10.3*
	298		
	325	33	10.2
4301-2017	~~324~~	~~32~~	~~10.0~~
700 Albion	*328*	*6*	*1.8*
	314		
	259	27	10.4
2100-1694	~~254~~	~~29~~	~~11.8~~
100 S. Broadway	*222*	*9*	*4.0*
	209		
	326	38	11.7
2100-1696	~~367~~	~~47~~	~~14.1~~
100 Bannock	*299*	*28*	*9.4*
	321		
			14.1
2702-1756	369	~~60~~	~~16.3~~
900 Pearl	*372*	*24*	*6.5*
	377		
	236	53	22.5
2701-1739	~~237~~	~~52~~	~~22.2~~
1100 Pearl	*274*	*34*	*12.4*
	271		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	269	27	10.0
2803-1790	~~270~~	~~30~~	~~11.2~~
100 Washington	*259*	*9*	*3.5*
	270		
	375	46	12.3
3101-1837	~~367~~	~~38~~	~~10.8~~
2000 Race	*204*	*9*	*4.4*
	207		
		44	12.9
2703-1768	342	~~47~~	~~14.0~~
1100 Pearl	*259*	*25*	*9.7*
	348		
		33	10.2
2703-1762	325	~~39~~	~~12.2~~
1400 Washington	*375*	*14*	*3.7*
	368		
	250	40	16.0
2703-1761	~~254~~	~~42~~	~~16.7~~
1400 Emerson	*380*	*39*	*10.3*
	375		
	342	43	12.6
2703-1770	~~343~~	~~42~~	~~12.7~~
1000 Ogden	*251*	*31*	*12.3*
	341		
	314	34	10.8
3702-1926	~~315~~	~~39~~	~~13.2~~
1300 Elizabeth	*401*	*10*	*2.5*
	270		
	11	0	0.0
3500-1894	~~10~~	~~1~~	~~12.5~~
4100 Garfield	*9*	*0*	*0*
	10		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
2901-1798 *400 S. Grant*	361 ~~363~~ *332* **338**	56 ~~33~~ *12*	15.5 ~~10.5~~ *3.6*
600-1581 *2300 Clay*	309 ~~306~~ *298* **309**	41 ~~35~~ *19*	13.3 ~~12.0~~ *6.4*
3601-1901 *3300 York*	278 ~~282~~ *307* **284**	26 ~~54~~ *44*	9.4 ~~20.8~~ *14.3*
2601-1727 *1700 Logan*	301 ~~303~~ *304* **308**	38 ~~40~~ *39*	12.6 ~~13.2~~ *12.8*
2601-1725 *1700 Pennsylvania*	358 *358* **336**	48 ~~47~~ *17*	13.4 ~~13.2~~ *4.8*
301-1528 *4200 Hooker*	340 *320* **333**	11 ~~9~~ *2*	3.2 ~~2.9~~ *.6*
301-1530 *3800 Meade*	287 ~~290~~ *280* **282**	15 ~~16~~ *8*	5.2 ~~5.7~~ *2.8*
102-1513 *4400 Perry*	289 ~~285~~ *277* **279**	7 ~~4~~ *3*	2.4 ~~1.5~~ *1.1*

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	305	5	1.6
102-1514	~~304~~	~~6~~	~~2.0~~
4400 Wolff	*303*	*6*	*1.8*
	302		
	452	54	12.0
6810-667	~~454~~	~~45~~	~~10.7~~
3700 S. Ulster	*442*	*6*	*1.4*
	380		
	332	13	3.9
102-1515	~~323~~	~~11~~	~~3.5~~
4500 Vrain	*325*	*5*	*1.5*
	329		
	373	29	7.8
3201-1857	~~366~~	~~7~~	~~2.0~~
1100 Marion	*351*	*11*	*3.1*
	364		
	596	93	15.6
6804-662	~~595~~	~~102~~	~~17.3~~
4600 S. Quebec	*543*	*14*	*2.6*
	599		
		18	5.7
303-1547	315	~~15~~	~~5.0~~
3000 Meade	*459*	*42*	*9.2*
	338		
	25	5	20.0
5300-2099	~~32~~	~~4~~	~~13.3~~
5100 E. Yale	*4*	*0*	*0*
	3		
	342	20	5.9
301-1531	~~347~~	~~8~~	~~2.7~~
3900 Vrain	*316*	*18*	*5.7*
	341		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	1044	142	13.6
6809-664	~~1090~~	~~125~~	~~12.3~~
3900 S. Oneida	*1029*	*11*	*.1*
	1108		
	344	75	21.8
2601-1728	~~331~~	~~65~~	~~19.8~~
1600 Pearl	*487*	*42*	*8.6*
	379		
	359	62	17.3
2602-1732	~~297~~	~~54~~	~~20.7~~
1700 Washington	*333*	*14*	*4.2*
	323		
	338	12	3.6
301-1529	~~336~~	~~7~~	~~2.3~~
4000 Grove	*326*	*4*	*1.2*
	333		
	212	51	24.1
3901-1946	~~184~~	~~26~~	~~15.0~~
2500 E. Alameda	*181*	*19*	*10.5*
	193		
	216	37	17.1
2602-1729	~~213~~	~~33~~	~~17.7~~
1700 Ogden	*222*	*7*	*3.2*
	203		
	335	74	22.1
3201-1851	~~354~~	~~62~~	~~20.5~~
800 Humboldt	*445*	*32*	*7.1*
	314		
	567	6	1.1
502-1568	~~568~~	~~5~~	~~0.9~~
2700 Meade	*562*	*3*	*0.5*
	556		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	316	7	2.2
501-1564	~~320~~	~~11~~	~~3.6~~
2600 Vrain	*301*	*3*	*1.0*
	307		
	324	23	7.1
303-1545	~~317~~	~~22~~	~~7.0~~
3400 Perry	*323*	*17*	*5.3*
	312		
	315	11	3.5
34-1879	~~316~~	~~9~~	~~2.9~~
400 S. Race	*318*	*8*	*2.5*
	313		
	99		9.1
5103-2082	~~101~~	9	~~10.2~~
1300 S. Birch	*99*	*2*	*2.0*
	100		
			4.8
302-1541	310	~~14~~	~~4.5~~
3000 Yates	*337*	*3*	*1.0*
	348		
	327		
102-1517	~~326~~	2	0.6
4700 Stuart	*329*	*6*	*1.8*
	332		
	349	22	6.3
301-1532	~~342~~	~~10~~	~~3.3~~
4300 Yates	*339*	*9*	*2.6*
	349		
	311	13	4.2
303-1546	~~301~~	~~12~~	~~4.1~~
3200 Julian	*290*	*5*	*1.7*
	290		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	394	26	6.6
701-1583	~~386~~	~~22~~	~~6.1~~
1300 Stuart	*378*	*15*	*4.0*
	370		
	326	10	3.1
3400-1878	~~336~~	~~11~~	~~3.4~~
200 S. High	*325*	*10*	*3.1*
	320		
	315	6	1.9
303-1543	~~318~~	~~2~~	~~0.7~~
3600 Julian	*310*	*5*	*1.6*
	305		
	328	21	6.4
502-1574	~~319~~	~~12~~	~~3.8~~
2100 Grove	*329*	*9*	*2.7*
	335		
	75	4	5.3
501-1567	~~71~~	~~3~~	~~4.4~~
2100 Stuart	*71*	*2*	*2.8*
	76		
	353	16	4.5
502-1571	~~351~~	~~18~~	~~5.3~~
2500 Grove	*379*	*8*	*2.1*
	345		
	383	14	3.7
701-1582	~~382~~	~~12~~	~~3.4~~
1400 Perry	*373*	*3*	*0.8*
	367		
		18	5.7
2901-1799	318	~~16~~	~~5.1~~
400 S. Pearl	*322*	*21*	*6.5*
	360		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	320	17	5.3
303-1542	~~315~~	~~11~~	~~3.6~~
3600 Meade	*294*	*4*	*1.4*
	307		
	301		
5001-2061	~~303~~	7	2.3
300 S. Leyden	*301*	*7*	*2.3*
	302		
2901-1800	303 N.C.	18	6.1
600 S. Sherman	*300*	*7*	*2.3*
	307		
	111	7	6.3
701-1586R	~~105~~	~~4~~	~~4.8~~
1600 Utica	*99*	*6*	*6.1*
	?		
	288	12	4.2
502-1569	~~279~~	~~14~~	~~5.3~~
2600 Lowell	*277*	*3*	*1.1*
	276		
	312	19	6.1
502-1570	~~310~~	~~20~~	~~6.8~~
2700 Hooker	*309*	*16*	*5.2*
	310		
	320	10	3.1
34-1881	~~318~~	~~8~~	~~2.6~~
700 S. Race	*306*	*5*	*1.6*
	307		
	329	6	1.8
2902-1805	~~331~~	~~7~~	~~2.1~~
700 S. Corona	*328*	*6*	*1.8*
	325		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
34-1884 *600 S. Gilpin*	331 ~~330~~ *326* **319**	10 ~~9~~ *2*	3.0 ~~2.7~~ *0.6*
34-1882 *1000 S. Vine*	330 ~~333~~ *329* **320**	8 *6*	2.4 *1.8*
701-1584 *1600 Wolff*	337 N.C. *353* **334**	10 *7*	3.0 *2.0*
701-1585 *1200 Yates*	352 ~~345~~ *340* **329**	41 ~~26~~ *21*	11.7 ~~8.0~~ *6.2*
702-1588 *1400 King*	294 ~~293~~ *289* **291**	15 ~~11~~ *9*	5.1 ~~3.9~~ *3.1*
702-1589 *1500 Meade*	332 ~~330~~ *314* **309**	10 ~~5~~ *2*	3.0 ~~1.8~~ *0.6*
702-1590 *1700 King*	317 ~~318~~ *328* **327**	26 ~~20~~ *18*	8.2 ~~6.8~~ *5.5*
901-1599 *800 Perry*	41 N.C. *37* **38**	1 *2*	2.7 *5.4*

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	378	3	0.8
901-1605	~~379~~	~~2~~	~~0.6~~
700 Vrain	*376*	*10*	*2.7*
	374		
	353	28	7.9
901-1606	~~354~~	~~18~~	~~6.6~~
600 Wolff	*356*	*31*	*8.7*
	344		
	325	9	2.8
2901-1801	~~327~~	~~3~~	~~1.1~~
700 S. Grant	*324*	*15*	*4.6*
	323		
	349	10	2.9
2902-1804	~~350~~	~~12~~	~~3.5~~
500 S. Ogden	*342*	*8*	*2.3*
	346		
	349	16	4.6
2902-1806	~~347~~	~~17~~	~~4.9~~
700 S. Pearl	*379*	*13*	*3.4*
	341		
4305-2038	212 N.C.	2	0.9
400 Oneida	*212*	*3*	*1.4*
	212		
	327	15	4.6
303-1544	~~322~~	~~13~~	~~4.1~~
3500 Irving	*326*	*10*	*3.1*
	335		
	305	12	3.9
702-1587	~~304~~	~~13~~	~~4.3~~
1300 Perry	*299*	*11*	*3.7*
	306		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
3001-1814 *1800 So. Pearl*	324 ~~327~~ *304* **298**	7 ~~5~~ *2*	2.2 ~~1.7~~ *0.7*
3002-1822 *2600 So. Pearl*	51 N.C. *51* **50**	1 *0*	2.0 *0.0*
900 Vrain *900 Vrain*	554 445 *445* **529**	67 24 *24*	12.1 5.4 *5.4*
3004-1831 *2400 So. Race*	385 ~~380~~ *380* **398**	25 *6*	6.5 ~~6.8~~ *1.6*
3004-1833 *2400 So. York*	285 ~~286~~ *287* **286**	16 *10*	5.6 *3.5*
3002-1821 *2500 So. Logan*	292 ~~291~~ *285* **281**	21 *12*	7.2 ~~7.3~~ *4.2*
3001-1817 *1600 So. Grant*	391 ~~380~~ *385* **370**	13 ~~9~~ *7*	3.3 ~~2.5~~ *1.8*
3800-1943 *100 So. Steele*	221 *219* **225**	8 ~~6~~ *2*	2.8 *0.9*

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	349	8	2.3
901-1604	~~361~~	~~9~~	~~0.9~~
700 Stuart	*326*	*5*	*1.5*
	331		
REVISED	60,425	6003	9.9
Census Total	60,227	5,567	9.2
Assessment Total	*59,715*	*3,404*	*5.7*
Planning Total	**59,540**	**(Not inc. 701-1586R)**	

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
3001-1812 *2000 S. Ogden*	302 ~~299~~ *293* **274**	15 ~~20~~ *7*	5.0 ~~6.8~~ *2.4*
901-1603 *600 Perry*	331 ~~332~~ *327* **324**	14 ~~17~~ *10*	4.2 ~~5.6~~ *3.1*
3002-1818 *2100 S. Pearl*	290 ~~288~~ *289* **279**	18 ~~15~~ *5*	6.2 ~~5.4~~ *1.7*
3002-1819 *2200 S. Ogden*	290 ~~278~~ *281* **274**	16 ~~13~~ *14*	5.5 ~~4.8~~ *4.9*
3004-1832 *2500 S. Gilpin*	323 ~~325~~ *298* **288**	17 ~~21~~ *6*	5.3 ~~6.6~~ *2.0*
3300-1871 *700 Detroit*	345 ~~337~~ *386* **393**	16 ~~11~~ *7*	4.6 ~~3.6~~ *1.8*
3800-1940 *200 Adams*	307 ~~310~~ *296* **385**	14 ~~10~~ *12*	4.6 ~~3.6~~ *4.1*
3800-1944 *100 S. Monroe*	189 ~~185~~ *185* **185**	13 ~~10~~ *9*	6.9 ~~5.6~~ *4.9*

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	319	20	6.3
4005-1959	~~335~~	~~24~~	~~7.7~~
1800 S. Clayton	*346*	*9*	*2.6*
	320		
	391	15	3.8
4005-1961	~~397~~	~~13~~	~~3.6~~
1800 S. Adams	*375*	*1*	*0.3*
	347		
	288	17	5.9
3901-1949	~~290~~	~~5~~	~~1.8~~
900 S. Adams	*278*	*1*	*0.4*
	278		
	293	4	1.4
3300-1870	~~303~~	~~0~~	~~0.0~~
900 Cook	*241*	*2*	*0.8*
	235		
	63	10	15.9
3901-1951	~~50~~	~~0~~	~~0.0~~
300 S. Jackson	*54*	*3*	*5.6*
	64		
	302	9	3.0
4005-1958	~~303~~	~~10~~	~~3.3~~
2000 S. Cook	*280*	*3*	*1.1*
	301		
	301	7	2.3
3902-1952	~~297~~	~~6~~	~~2.1~~
1100 S. Cook	*298*	*3*	*1.0*
	300		
	321	8	2.5
3004-1829	~~320~~	~~11~~	~~3.4~~
2100 S. Marion	*305*	*10*	*3.3*
	302		

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	284	7	2.5
3004-1830	~~385~~	~~8~~	~~2.8~~
2300 S. Gilpin	*280*	*4*	*1.4*
	276		
	609	19	3.1
3005-605	~~589~~	~~19~~	~~3.2~~
3000 S. Vine	*605*	*4*	*0.7*
	601		
		11	4.1
3003-1824	267	~~7~~	~~2.7~~
1900 S. High	*262*	*9*	*3.4*
	261		
	318	8	2.5
3901-1947	~~385~~	~~9~~	~~3.2~~
3100 E. Alameda	*326*	*7*	*2.2*
	323		
	261	11	4.2
4006-2962	~~276~~	~~8~~	~~3.0~~
2500 S. Cook	*256*	*5*	*1.9*
	251		
	283	6	2.1
4006-1963	~~284~~	~~5~~	~~1.9~~
2400 S. Adams	*281*	*4*	*1.4*
	282		
	291	2	0.7
3902-1955	~~299~~	2	0.7
1400 S. Steele	*292*	*5*	*1.7*
	293		
	2145	644	30.0
7006-691	~~2142~~	~~558~~	~~30.5~~
3100 S. Parker Rd	*1977*	*205*	*10.4*
	2150		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	299	3	1.0
4006-1967	~~322~~	~~3~~	~~1.0~~
2400 S. Adams	*316*	*3*	*0.9*
	307		
	315	13	4.1
3004-1828	~~313~~	~~11~~	~~3.5~~
2500 S. Vine	*298*	*4*	*1.3*
	300		
	322	11	3.4
3800-1939	~~325~~	~~7~~	~~2.4~~
300 Adams	*315*	*15*	*4.7*
	342		
	285	8	2.8
3902-1953	~~286~~	~~7~~	~~2.5~~
1400 S. Steele	*285*	*4*	*1.4*
	282		
	326	9	2.8
4005-1960	~~329~~	~~1~~	~~0.4~~
1800 S. Cook	*288*	*5*	*1.7*
	301		
	505	12	2.4
4002-606	~~512~~	~~12~~	~~2.3~~
2800 S. Steele	*498*	*8*	*1.6*
	501		
	283	4	1.4
4006-1968	~~284~~	~~4~~	~~1.4~~
2500 S. Monroe	*276*	*0*	*0.0*
	289		
	647	42	6.5
3003-1823	~~219~~	~~8~~	~~4.3~~
2000 S. Marion	*579*	*14*	*2.4*
	579		

1980 CENSUS REVIEW

Revised Census District Census District *Assessment* **Denver Planning**	No. of Units	No. Vacant	% Vacancy
	321	23	7.2
3800-1941	~~321~~	~~29~~	~~9.4~~
200 Cook	*323*	*15*	*4.6*
	333		
	306	3	1.0
3901-1945	~~312~~	~~3~~	~~1.0~~
900 S. Euclid	*298*	*3*	*1.0*
	300		
	340	4	2.1
3300-1872	~~340~~	~~9~~	~~2.1~~
800 Cook	*335*	*5*	*1.5*
	339		
Revised	73,487	7,059	9.6
Census Total	72,966	6,463	8.9
Assessment Total	*72,337*	*3,825*	*5.3*
Planning Total	**72,399**		

[PLAINTIFF'S EXHIBIT #17]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

WILLIAM H. McNICHOLS, Jr., et al.,
Plaintiffs,

v.

PHILIP M. KLUTZNICK, et al.,
Defendants.

CIVIL ACTION NO. 80-C1151

REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs request Defendants to produce and permit Plaintiffs and their agents to inspect and make use of the Follow-Up Address Register (FAR) and any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver for use in connection with the review of the data used in computing the population figure for the City and County of Denver within the time as determined by law but no later than 30 days from the date of this Request under the following conditions:

1. That such data and information shall be used only for purposes of the Census;

2. That each and every person having access to the data and information be sworn to confidentiality under 13 U.S.C. (c):

3. That the Bureau edit out any references to the

providers of information contained therein.

Please produce the requested documents in Room 353, City and County Building, Denver, Colorado 80202.

Respectfully submitted,

MAX P. ZALL, #2367
Attorney for the City and County of Denver
GEORGE J. CERRONE, JR., #3430
Assistant City Attorney
Attorneys for Plaintiffs
By /s/
George J. Cerrone, Jr., #3430
Attorney for Plaintiffs
353 City and County Building
Denver, Colorado
(303) 575-2665

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. McNICHOLS, JR., et al.,
Plaintiffs,

v.

PHILIP M. KLUTZNICK, et al.,
Defendants.

ORDER

The plaintiffs in this action challenge the population count reached by the Bureau of the Census for the City and County of Denver, Colorado. The plaintiffs filed a motion for temporary restraining order and a motion for preliminary injunction. In connection with those motions, the Court has heard extensive evidence regarding the Census Bureau's methodology and the City's challenges to the census count. The Court is therefore well acquainted with the issues ultimately to be raised on the merits.

In addition, the plaintiffs have filed a request for production of documents, together with a motion to have production expedited because of the short time period in which census challenges must be determined. In that request, the plaintiffs seek the "Follow-Up Address Registers (FARs) and "any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver."

The thrust of the City's challenges to the census is directed to the Bureau's determination that there were

over 16,000 vacant housing units in the City on April 1, 1980, the effective date of the census. The City's trained and experienced real estate assessment personnel have conducted actual checks of about one-third of Denver's residential real estate units, and as a result of that survey, the City contends that the Bureau has "over-counted" vacancies by a factor of 46%. However, it has been impossible for the City to challenge the Bureau's finding that any particular housing unit was "vacant" on April 1, 1980 because the Bureau has declined to inform the City which units it counted as vacant. For the purpose of contesting the vacancy count, the City seeks to discover the list or register of those dwellings defined by the Bureau as "vacant" in the 1980 census. The Court therefore concludes that the request for production essentially relates only to the FARs, or other documents which contain the vacancy information, and this Order is directed only to those documents. The City has conceded that production of the FARs will satisfy the instant discovery request, despite the over-breadth of its original request for production.

The Bureau in refusing the discovery request, relies primarily on the contention that the information sought is confidential because it falls within the meaning and intent of 13 U.S.C. section 9. The Bureau argues that Congress provided for confidentiality of all census return information in order to assure voluntary compliance by census respondents so that accurate data can be compiled, and that section 9 prohibits the discovery here sought.

In response, the City contends that the purpose of the confidentiality provision would not be undercut by providing vacancy lists, since neither the names of census respondents nor answers to census questions need by provided. In addition, the City argues that 13 U.S.C. section 9 does not bar this doscovery because that sec-

tion only prohibits "use [of] the information furnished for any purpose other than the statistical purpose for which it is supplied." The City asserts that this is precisely the purpose, and the only purpose, for which the information will be used.

The Court has considered carefully the foregoing arguments as well as the evidence presented by both sides in the substantial proceedings held to date. In particular, the Court has considered evidence presented by the Bureau which indicates that definitional differences between the parties as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City. Despite this evidence, it appears to the Court that there is no way that the actual effect of the definitional differences can be verified unless the City can discover the FARs, which will tell the City *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination. extremely important constitutional and statutory rights are at stake in this case. The final census count will effect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure 500,000 is a threshold of city size affecting both state and federal grants. The Bureau proposes a 1980 census for Denver just over 491,000, whereas Denver claims its population is over 500,000 and that the vacancies in dispute would make up the difference if fully counted. The Bureau has admitted that it undercounted by about 2.5% as a national average in 1970. Obviously an adjustment of that magnitude also would put Denver over 500,000.

Considering the intent and purpose of the confidentiality requirements of 13 U.S.C. section 9, the Court concludes that the purposes of that section can

be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

Accordingly, it is

ORDERED that the defendants shall produce the FARs for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980;

ORDERED that the defendants shall delete from said information any and all names of persons or other references which might identify respondents to the census, either directly or indirectly;

ORDERED that every employee, officer, or agent of the City and County of Denver before having access to the information provided shall be sworn to the same oath of secrecy and confidentiality as required of personnel of the Bureau of the Census;

ORDERED that the plaintiffs shall not allow any person subject to their control and not subject to such oath access to the information made available hereunder;

ORDERED that a copy of this Order shall be served upon every employee, officer or agent having access to the information provided by the Bureau, and every such employee is hereby ORDERED not to disclose such information to anyone not subject to the oath of confidentiality;

ORDERED that the information provided pursuant to this Order shall not be used for any purpose except to seek the correction or adjustment of the population figures for the City and County of Denver for the 1980 census;

ORDERED that the information provided hereunder shall not be publicized or made public in any way;

ORDERED that the defendants may at their option provide one more of their employees, officers or agents to accompany each employee, officer or agent of the plaintiffs in checking and verifying the April 1, 1980, status of occupancy or vacancy of the living units at issue, and in the event that the defendants elect to follow this procedure and the population of the City and County of Denver is ultimately determined to be under 500,000, the defendants may apply to the Court for reimbursement by the City of the reasonable and necessary expenses incurred in making this cooperative effort with the plaintiffs;

ORDERED that the plaintiffs, by accepting the information made available through this Order, accept as a condition thereof the foregoing Order regarding payment of the defendant's reasonable and necessary expenses;

ORDERED that this Order shall be effective immediately as of the date written below; provided, however, that enforcement of the Order is hereby stayed for a period of seven days from that date, and

ORDERED that a copy of this Order shall be served immediately on the United States Attorney for the District of Colorado.

Finally, the Court finds and concludes, pursuant to 28 U.S.C. section 1292(b), that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

DATED at Denver, Colorado, this 17 day of September, 1980.

BY THE COURT:

/s/ Jim R. Carrigan, Judge
United States District Court

SEPTEMBER TERM
September 29, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges

---

WILLIAM H. McNICHOLS, JR., et al.,
Appellees,

v.

PHILIP M. KLUTZNICK, et al.,
Appellants.

No. 80-8043
(D.C. No. 80-C-1151)

This matter comes on for consideration of appellants' petition for leave to appeal pursuant to 28 U.S.C. 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

HOWARD K. PHILLIPS
Clerk

By: /s/
Robert L. Hoecker
Chief Deputy Clerk

SEPTEMBER TERM
September 29, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges

---

WILLIAM H. McNICHOLS, JR., et at.,
Appellees,

v.

PHILIP M. KLUTZNICK, et al.,
Appellants.

No. 80-2023
(D.C. No. 80-C-1151)

This matter comes on for consideration of appellants' motion for stay pending appeal in the captioned case.

The Court has today by separate order granted appellants' leave to appeal under 28 U.S.C. 1292(b).

Upon consideration whereof, appellants' motion for stay is granted. The order of the United States District Court for the District of Colorado entered September 17, 1980, in the captioned case is stayed until further order of this Court.

On or before October 6, 1980, each party shall file with the Court a written statement as to the need for, and desirability of, an expedited appeal.

HOWARD K. PHILLIPS
Clerk

By: /s/
Robert L. Hoecker
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER L. STEVAS,

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Case:

Baldrige v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981) 4, 5

Statutes:

13 U.S.C. 9 ..... 3, 4

13 U.S.C. 9(a)(1) 3

13 U.S.C. 9(a)(2) 3

28 U.S.C. 1292(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1781

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

In this action challenging the 1980 decennial census figures for Denver, Colorado, petitioners assert that they are entitled to access, through discovery, to confidential lists of residential addresses or vacant dwelling units compiled by the Bureau of the Census.

1. Petitioners, the City and County of Denver and the Mayor of Denver, brought this action in the United States District Court for the District of Colorado to challenge the accuracy of the 1980 census for Denver. Preliminary census figures indicated a total of 491,651 people living in Denver (Pet. 5; Pet. App. A-3),[1] but petitioners contended that the City's population is "over 500,000" (Pet. 4). According to petitioners (Pet. 7), the 500,000 figure is significant because

[1]We have been informed by the Bureau of the Census that the final figure for Denver is 491,396.

it affects both state and federal grants. Petitioners also contend (Pet. 4, 7, 9-10) that the difference between the 491,651 counted in the 1980 census and the claimed total of more than 500,000 would affect the apportionment within Colorado of the State's congressional seats as well as Denver's representation in both Houses of the Colorado General Assembly.[2]

The thrust of petitioners' challenge in the district court was to the Bureau's determination that there were over 16,000 vacant housing units in Denver on April 1, 1980, a figure they alleged was too high. Petitioners sought to obtain "Follow-Up Address Registers" (FARs) and other Bureau documents that identified the units the Bureau had counted as vacant. The information sought by petitioners was derived from the Bureau's questionnaire program and follow-up interviews (Pet. App. A-2, A-8).

The district court acknowledged that evidence submitted by the Bureau of the Census "indicates that definitional differences between the parties as to what constitutes a 'vacancy' may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City" (Pet. App. A-3). The district court nevertheless ordered the Bureau to disclose the FARs to petitioners or, alternatively, to produce a list derived from the FARs that identifies the addresses of living units in Denver that the Bureau had determined to be vacant on April 1, 1980. The court believed this disclosure appropriate in order to determine

---

[2]Petitioners do not suggest, however, that an adjustment for the alleged undercount would result in the allocation to Colorado of an *additional* representative in Congress. We have been informed by the Bureau of the Census that, in order to be allocated an additional representative, Colorado would have to gain an additional 508,091 people—a figure far in excess of the number claimed in the instant litigation.

the actual effect of the difference in the definitions of the term "vacancy" utilized by Denver and the Bureau (Pet. App. A-4 to A-5).

2. The court of appeals reversed the discovery order (Pet. App. A-7 to A-11; 644 F. 2d 844),[3] concluding that "both the history of the Census Act and the broad language of the confidentiality provisions of [13 U.S.C. 9] make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (Pet. App. A-10). The court of appeals observed that the district court's order "tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality" by directing that Denver officials maintain confidentiality of the information (*id.* at A-9) and concluded that, in view of the express congressional prohibitions on disclosure, the district court did not have "authority to substitute its own techniques for protecting the confidentiality mandated by the statute" (*id.* at A-10).

The court of appeals also rejected the contention that release of the census data to petitioners was not covered by the prohibitions in 13 U.S.C. 9 because petitioners' challenge to the conduct of the 1980 census was one of the "statistical purposes for which [the information sought] is supplied" to the Bureau (Pet. App. A-10 to A-11, quoting 13 U.S.C. 9(a)(1)). Similarly, the court rejected (Pet. App. A-11) the contention that the prohibition in 13 U.S.C. 9(a)(2) against "publication" of census data barred only dissemination through the media. Accordingly, the court concluded that any remedies petitioners might have to obtain an adjustment of census figures "must lie in some

---

[3]The government had appealed the discovery order pursuant to 28 U.S.C. 1292(b).

device other than devices expressly prohibited by a congressional exercise of constitutional authority" (Pet. App. A-11).

3. The decision of the court of appeals preserving the confidentiality of census data is correct and does not, in itself, warrant review by this Court. However, the Court has granted the government's petition for a writ of certiorari in *Baldrige* v. *Shapiro*, No. 80-1436 (Apr. 27, 1981), to review the Third Circuit's decision requiring the Bureau of the Census to release address lists to local officials under the Freedom of Information Act in order to enable them to challenge census figures. In the instant case, petitioners argue (Pet. 12-13), as the Third Circuit held in *Baldrige* v. *Shapiro*, that disclosure to local officials is not barred by 13 U.S.C. 9 because their challenge to the census figures is part of the "statistical purposes" for which the data are supplied.[4] Moreover, here, as in *Baldrige* v. *Shapiro*, the district court sought to circumvent the strict confidentiality requirements of the census laws by ordering the local officials to use the materials solely to challenge census figures and not to disclose the materials to any other person.

Ordinarily, because of the identity of legal issues, we would suggest that the Court hold the petition in this case pending its decision in *Baldrige* v. *Shapiro*. However, in order to ensure that all aspects of census confidentiality are finally resolved, we suggest that the Court grant the petition for a writ of certiorari here. The instant case involves a

---

[4]This rationale is explained in the district court's opinion in *Baldrige* v. *Shapiro* (80-1436 Pet. App. 10a-11a). The Third Circuit affirmed "generally for the reasons stated by the district court" (*id.* at 2a). The argument of petitioners herein and the holding of the Third Circuit in *Baldrige* v. *Shapiro* on the "statistical purposes" point are in error for the reasons stated (at 11-12 and 17-18) in the government's certiorari petition in *Baldrige* v. *Shapiro*. We are sending petitioners a copy of the government's petition in that case.

discovery motion to compel production of address lists, not an FOIA request.[5] Review of the Tenth Circuit's decision in this case therefore could foreclose the possibility that, even if the Court reverses the Third Circuit's decision in *Baldrige* v. *Shapiro* requiring disclosure under the Freedom of Information Act, a plaintiff who seeks to obtain access to census materials through discovery in some future case challenging census figures will argue that a discovery request should be viewed differently from an FOIA request. If the Court grants certiorari in this case, we believe that it would be appropriate to consolidate the case with *Baldrige* v. *Shapiro* for purposes of oral argument and to allocate an hour and a half for argument of the two cases.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

---

[5]The issue of access to address lists through discovery is pending before two other courts of appeals. See *Baldrige* v. *Carey*, No. 81-6042 (2d Cir.); *City of Philadelphia* v. *Baldrige*, No. 80-2785 (3d Cir.).

Office Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

BRIEF OF PETITIONERS

MAX P. ZALL
City Attorney
GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665

QUESTIONS PRESENTED

1. Are the addresses of living units in the City and County of Denver deemed by the Census Bureau to be vacant on April 1, 1980, protected by the privilege of confidentiality of 13 U.S.C. § 9?

2. Did the Order of the District Court, with its protective provisions, violate the privilege of confidentiality of 13 U.S.C. § 9?

3. Does the interpretation and application of the protection of the privilege of confidentiality afforded by 13 U.S.C. § 9 to the facts in this case by the Court of Appeals violate the Constitutional requirements of equal representation and one person-one vote?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONS 2

CONSTITUTION, RULES AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 6

A. Facts 6

B. Decisions Below 8

SUMMARY OF ARGUMENT 11

ARGUMENT 12

The interpretation and application of the privilege of confidentiality of 13 U.S.C. § 9 to the facts in this case by the Court of Appeals violates the constitutional requirements of equal representation and one person-one vote 12

The addresses of living units in the City deemed to be vacant on April 1, 1980 by the Census Bureau are not protected by the privilege of confidentiality of Section 9 of the Census Act 16

The Order of the District Court did not violate any privilege 22

CONCLUSION 23

APPENDICES

District Court Order..... A-1
Court of Appeals Opinion and Decision..... B-1

TABLE OF AUTHORITIES

CASES:

Baker v. *Carr*, 369 U.S. 186 (1962) 13
Carey v. *Klutznick*, No. 81-6042 (2nd Cir. 1981) 18
Cort v. *Ash* 422 U.S. 66 (1975) 17
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 12, 14
McNichols v. *Klutznick*, 644 F.2d 844 (10th Cir. 1981) 1, 11, 18
Northwest Airlines, Inc. v. *Transport Workers Union of America*, 451 U.S._____, 67 L.Ed.2d 750, 101 S.Ct. 1571 (1981) 17
Prigg v. *The Commonwealth of Pennsylvania*, 41 U.S. 539 (1842) 14
Reynolds v. *Simms*, 377 U.S. 533 (1964) 14
Seymour v. *Barabba*, 559 F.2d 806 (1977) 2
St. Regis Paper Co. v. *United States*, 368 U.S. 208 (1961) 17, 19, 20
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) 21
United States v. *Littles*, 321 F.Supp. 388 (D.Del. 1971) 21
United States v. *Missouri Pacific R.R. Co.*, 278 U.S. 269 (1929) 17
United States v. *Bryan*, 339 U.S. 323 (1949) 12
Universities Research Association v. *Coutu*, 450 U.S._____, 67 L.Ed 2d 662, 101 S.Ct. 1451 (1981) 17

Wells v. *Rockefeller*, 394 U.S. 542 (1969) 12
Westberry v. *Sanders*, 376 U.S. 1 (1964) 12

CONSTITUTIONS:

U.S. Constitution, Article I, Section 2 ..... 2, 8, 12
U.S. Constitution, Amendment XIV, Section 2 3
Colorado Constitution, Article V, Sections 44 through 48 14

STATUTES:

Census Act (Title 13, U.S.C.) ..... 4, 9, 10, 12, 15, 20, 22.
Section 9 ..... 4, 9, 10, 12, 16, 17, 19, 20, 22.
Section 9(a) (1) 5
Section 9(a) (2) 5
Section 9(a) (3) 5, 19
Section 141 6

Jurisdictional Statutes:
5 U.S.C. 552 8
28 U.S.C. 1292(b) 10
28 U.S.C. 1254 (l) 2
28 U.S.C. 1331 8
28 U.S.C. 1337 8
28 U.S.C. 1361 8
28 U.S.C. 2201 8
28 U.S.C. 2202 8

Colorado Revised Statutes:
2-1-101 C.R.S. 1973, *et seq.*, as amended 14
2-2-101 C.R.S. 1973, *et seq.*, as amended 14

RULES:

Rule 26(b) (1) Fed. R. Civ. Proc. 4
Rule 34(a) Fed. R. Civ. Proc. 3

MISCELLANEOUS:

Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Johnson, reprinted in [1962] U.S. Code Cong. & Ad. News 3190, 3191 20

H.R. Report No. 2437, 87th Cong., 2nd Sess., 1-2 (1962) 20

H.R. Rep. No. 10569, 87th Cong., 2nd Sess. (1962), printed in Hearing before the Comm. and Post Office and Civil Serv., Confidentiality of Census Reports, 87th Cong., 2nd Sess. (1962) 20

S. Rep. No. 2218, 87th Cong., 2nd Sess. 2 (1962), reprinted in [1962] U.S. Code Cong. Ad. News 3188, 3189 19

8 *Wigmore, Evidence* § 2192 (McNaughton Rev. 1961) 13

49 U.S.L.W. 3826 2

49 U.S.L.W. 3931 2

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of Colorado (Carrigan, J.) is not officially reported but appears in the Appendix at page A-1. The opinion of Judge McKay for the Tenth Circuit Court of Appeals is reported at 644 F.2d 844 (10th Cir. 1981) and appears in the Appendix at page B-1. The captions in those proceedings included Philip M. Klutznick as the Secretary of the U.S. Department of Commerce, Vincent P. Barabba as the Director of the U.S. Bureau

of the Census, and Leo Schilling as the Regional Director of the U.S. Bureau of the Census; each of whom has been succeeded in office and has been replaced in the caption in This Court by Malcolm Baldridge, Daniel B. Levine and William Adams, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1981, the Petition for Writ of Certiorari was filed April 24, 1981,[2] within ninety days of that decision, and the Writ of Certiorari was granted by This Court on June 15, 1981.[3] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, RULES AND STATUTE INVOLVED

Clause 3 of Section 2 of Article I of the U.S. Constitution reads, in pertinent part, as follows:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be

---

[1] Petitioners, the plaintiffs below, are William H. McNichols, Jr., a citizen and elector of the United States, of the State of Colorado and of the City and County of Denver and the Mayor of the City and County of Denver, and the City and County of Denver, a municipal corporation of the State of Colorado.

[2] 49 U.S.L.W. 3826

[3] 49 U.S.L.W. 3931

> determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

Section 2 of the Fourteenth Amendment to the U.S. Constitution reads, in pertinent part, as follows:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

Rule 34(a) of the Federal Rules of Civil Procedure (F.R.C.P.) reads as follows:

> Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.
>
> (a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things

which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Rule 26(b) (1) F.R.C.P. reads as follows:

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Section 9 of the Census Act, 13 U.S.C. § 9 reads as follows:

Sec. 9. Information as confidential; exception

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

STATEMENT OF THE CASE

A. Facts

In this action William H. McNichols, Jr., as an individual citizen and elector of the United States, of the State of Colorado, and of the City and County of Denver, and as the Mayor of the City and County of Denver, and the City and County of Denver (herein sometimes referred to collectively as "Denver") complain that the count of the population within Denver is inaccurate and has been inaccurately reported by the U.S. Census Bureau, an agency of the U.S. Department of Commerce (herein sometimes referred to as "Bureau"), which shall cause the improper apportionment of Congressional representation within the State of Colorado and the improper apportionment of Colorado State senators and representatives and deprive the people of the City and County certain statutory rights. Denver claims that the Bureau did not count all of the population in Denver and particularly those persons who should have been counted and who reside in living units which the Bureau deduced were vacant on Census Day.[4]

---

[4] Census Day was declared to be April 1, 1980, as of which day the population of the United States would be counted. 13 U.S.C. 141.

In 1970 the Bureau certified that the population in Denver was 514,800 people. (J.A.30). The population for Denver has been consistently estimated and projected during the 1970's by the Denver Regional Council of Governments, a regional agency of the State of Colorado, not governed or controlled by Denver, as being above 520,000 persons. The Denver Regional Council of Governments estimate of Denver's population for 1977 was 522,100; for 1978, 522,500; for 1979, 521,700; and for 1980, 521,300. (J.A. 41). The Denver Regional Council of Governments has been making estimates and projections for population in the Denver Metropolitan area for 25 years. (J.A. 43).

Denver submits that its population is over 500,000 and bases its claim on the number of water and sewer taps permitted, the number of telephones installed, information contained in its Building Department records and its assessment records and information obtained from the Office of the Governor of the State of Colorado, the Denver Board of Realtors, the U.S. Post Office, and the Denver Regional Council of Governments. (J.A. 28-30).

Although the Bureau's preliminary figures were increased from 455,000 to 491,651, (J.A. 25) Denver registered its protest and made its challenge to the figures of the Bureau upon its receipt of these preliminary figures. (J.A. 26). Officials of the Bureau checked the status of occupancy of a few particular buildings which Denver claimed had fewer vacancies than were shown by the data from the Bureau (J.A. 60,61) and confirmed to Denver the number of vacancies in those particular buildings located in the city at the request of Denver. (J.A. 65-68).

Denver commenced and conducted a population and vacancy survey of its own which included surveying approximately one-third of the living units in the

city which were selected for examination due to the relatively high vacancy rate assigned to those areas by the Bureau. (J.A. 26-18, 88-110). The results of the population and vacancy survey of the city showed a 5.3% vacancy rate as apposed to the 9.6% vacancy rate of the Bureau; and that the Bureau indicated 46% more vacant units than did the survey of Denver. (J.A. 35).

The opinion of the Assessor of the City is that the vacancy rate for Denver on Census Day was 3%; (J.A. 37) and the opinion of one of the appraisers of the city was that the vacancy rate on Census Day was from 3% to 4%. (J.A. 40). The Bureau wrote off too many living units in Denver as vacant.

The statistics and data of the Bureau indicate that the average number of persons residing in a living unit in Denver is 2.2 persons (J.A. 62). The Regional Administrator of the Bureau admitted at the hearing on Denver's application for preliminary injunction that not every person in the city was counted by the Bureau in the 1980 Decennial Census. (J.A. 73).

B. Decisions Below

The jurisdiction of the U.S. District Court for the District of Colorado was invoked due to the existence of a federal question under 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202, a claim under the Freedom of Information Act, 5 U.S.C. § 552, and a claim concerning violation of rights guaranteed by Article I, Section 2, Clause 3 of the Constitution of the United States of America.

Denver initially sought a temporary restraining order keeping open the Bureau's Denver offices. The parties agreed, however, that the offices could close so long as the Bureau kept its updated master address list, known as the Follow-up Address Registers (FARs), in Denver during this lawsuit. Denver then sought a preliminary injunction requiring, in essence, that the

Bureau cooperate with the city in verifying the vacancy data. The court did not rule on the preliminary injunction, and still has not, but focused instead on the question whether Denver should have access to the vacancy information in the FARs to check the Bureau's vacancy tabulations. After initially seeking the vacancy information in the FARs under the Freedom of Information Act, Petitioners sought production of the documents under the federal discovery rules. The Bureau maintained that the information in the FARs must remain confidential pursuant to a disclosure bar contained in 13 U.S.C. § 9.

The district court found that:

(1) There is no way that the actual effect of the definitional differences between the methodologies of Denver and the Bureau, if any there be, can be verified and evaluated unless Denver can discover the vacancy information in the FARs, which tell Denver which dwellings the Bureau counted as vacant as of April 1, 1980[5];

(2) To deny Denver discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determinations concerning the 1980 Decennial Census;

(3) Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General As-

[5] The government disregarded the results of the City's survey of one-third of the City which showed a substantially lower vacancy rate than that of the Bureau on the basis that the definitions and methodologies used by the City were incorrect and different from those of the Bureau and invalid. Due to the subjectivity of these matters, the only place to start comparison must be the data leading to the conclusions and the results.

sembly for the ensuing decade. Moreover, the population figure of 500,000 is a threshold of city size affecting both the state and federal grants; and

(4) The vacancies in dispute could make up the difference between the 491,000 which the Bureau proposes and the 500,000 which Denver claims is its population at a minimum.

The district court concluded that the purposes of Section 9 of Title 13, U.S.C. can be maintained in this case without denying Denver the right to discovery of documents clearly relevant and indispensable to its case.

On this rationale the court entered a multi-part discovery order:

(1) The government must produce the FARs, or alternatively, a list of vacant addresses culled from the FARs;
(2) all names and other identifying references must be deleted;
(3) all city employees given access to the information must take the same secrecy oath as Bureau employees;
(4) the information obtained may be used only to seek adjustment of the census; and
(5) Bureau officials may at their option accompany Denver employees seeking to verify the Bureau's vacancy data.

The district court certified its order for immediate appeal under 28 U.S.C. § 1292(b) and stayed its order temporarily.

The Court of Appeals stayed the discovery order of the District Court and granted permission to take the interlocutory appeal and assumed jurisdiction under 28 U.S.C. § 1292(b). The Court of Appeals reversed the

discovery order, holding that Congress had made the information sought by Petitioners immune from discovery and that there can be no judicial exception made to that immunity. 644 F2d 844 (10th Cir. 1981).

SUMMARY OF ARGUMENT

The Court of Appeals should not have approved the privilege of confidentiality proposed by the Bureau and its judgment should be reversed. The requirement imposed by This Court of a strict construction of any claimed exemption to the duty to give evidence and the right to receive evidence, particularly with respect to the Census Act, cannot result in the prohibition of the disclosure of addresses of supposedly vacant living units in Denver.

The words and phrases of the Census Act, its legislative history, and its purposes and structure clearly show that Congress did not intend that disclosure of addresses of supposedly vacant living units be denied to Denver and thus deprive it of any meaningful ability to assure the accuracy and completeness of the 1980 Decennial Census.

Without the disclosure of the addresses of those living units, the fundamental rights of equal representation and of the equality of each person's vote mandated by the people through the Constitution and the Congress through the Census Act cannot in this instance be protected and assured to the greatest extent possible.

The District Court included in its discovery order provisions which may go beyond the protections and requirements of the Census Act but that shall ensure not only that the integrity of the census data will be preserved, but also that the appearance of such integrity shall be put forth.

ARGUMENT

THE INTERPRETATION AND APPLICATION OF THE PRIVILEGE OF CONFIDENTIALITY OF 13 U.S.C. §9 TO THE FACTS IN THIS CASE BY THE COURT OF APPEALS VIOLATES THE CONSTITUTIONAL REQUIREMENTS OF EQUAL REPRESENTATION AND ONE PERSON-ONE VOTE

This Court has held that Article I, Section 2, of the Constitution means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Westbury* v. *Sanders*, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal" *id* at 18. See also *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

This Court has also endorsed the principle that the people, through their courts, have a right to all evidence pertaining to the matter in litigation, and that any exemption from this rule must be examined closely and the interest to be protected by the exemption must outweigh the interest of the public in the litigation and in being made aware of all the relevant facts of the matter. In *United States* v. *Bryan*, 339 U.S. 323, 331 (1949), Chief Justice Vinson wrote for This Court:

> Certain exemptions from attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of

> experience, to outweigh the public interest in the search for truth. Dean Wigmore stated the proposition thus: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."[6]

The Court continued, in giving guidance for the consideration of any exemption to this positive general rule, that each such exemption must be closely examined:

> Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. *Id.* at 332.

As against the interest of the Bureau of expanding the cloak of secrecy over all of its activities, Denver is attempting to vindicate and protect the "right to a vote free of arbitrary impairment," *Baker* v. *Carr*, 369 U.S. 186, 208 (1962), in that an inaccurate census count of the population of the City and County of Denver shall result in the improper apportionment and districting of congressional and state legislative representation. The

---

[6] See 8 *Wigmore, Evidence* §2192 (McNaughton Rev. 1961).

states must, as a practical matter, rely on the federal census data for the purposes of congressional redistricting within each state. *Kirkpatrick* v. *Preisler*, supra; *Prigg* v. *The Commonwealth of Pennsylvania*, 41 U.S. 539 (1842). The Constitution and statutes of the State of Colorado require that census data be used in districting not only for congressional representation but also the representation of both houses of the State General Assembly. Colo. Constit. Art. V. Sect. 44 through 48; 2-1-101 C.R.S. 1973, et seq., as amended, and 2-2-101 C.R.S. 1973, et seq., as amended.[7]

Petitioners recognize that mathematical exactness or precision is "hardly a workable constitutional requirement," *Reynolds* v. *Sims*. 377 U.S. 533, 577 (1964), with respect to the census count of the population in the United States. But in this case, the evidence shows that there is substantial doubt as to the accuracy of the census for the City and County of Denver and that there is a practicable way to make the census more accurate. The statistical data from sources such as numbers of telephones, water taps, sewer taps, building permits, electric and gas connection and usage, and studies of population by traditional agencies of regional government, as well as the results of the special survey of Denver of one-third of the living units in the City and County of Denver belie the preliminary population figures of the Bureau.

The area which appeared to cause the inaccuracy of the Bureau was its deducing more of the living units of the City and County of Denver vacant than actually were vacant and therefore not counting the people who

---

[7] Not only do the provisions of the Constitution and the laws as cited above require reliance on the Decennial Census for reapportionment, but the Census Bureau urged any agency other than it not to conduct its own census while the Census Bureau was so doing so as not to "create confusion." (J.A. 39).

reside in those living units. Denver proposed that these be verified as against the results of the City's special survey as well as for the remainder of the City. The Bureau balked at the ideas that it erred and that the information gathered by the City was valid and that any such verification would be worthwhile or produce results different from the preliminary figures.

The trial court disagreed with the Bureau after having heard testimony and received evidence on Denver's application for a preliminary injunction. The District Court found that while it may be that definitional differences between Denver and the Bureau as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by Denver, there is no way that the actual effect of such definitional differences can be verified unless Denver can discover which dwellings the Bureau counted as vacant as of April 1, 1980.

The District Court found that to deny Denver discovery of the information concerning vacant units will essentially deny it any meaningful ability to challenge the Bureau's determinations. It recognized and stated in its order that extremely important constitutional rights are at stake in this case, includling representation in Congress and in the State Assembly.

The purpose of Title 13 of the United State Code is to enable and assure an accurate and complete enumeration of the population so that in districting for legislative representation, each person's vote will be equal to another's. However, in this case, the claim of the Bureau and the interpretation and application of the Court of Appeals of the confidentiality provisions of that statute impede the attainment of the goal of an accurate and complete enumeration.

Denver does not submit that the confidentiality provisions of Title 13 U.S.C. are themselves unconstitu-

tional, but only that the interpretation and application of those confidentiality provisions to the facts in this case result in an impermissible restraint on attaining the most accurate and complete enumeration which, as a practical matter, can be performed under these circumstances.

THE ADDRESSES OF LIVING UNITS IN THE CITY DEEMED TO BE VACANT ON APRIL 1, 1980 BY THE CENSUS BUREAU ARE NOT PROTECTED BY THE PRIVILEGE OF CONFIDENTIALITY OF SECTION 9 OF THE CENSUS ACT

The list of addresses of living units in the City and County of Denver deduced by the Bureau to be vacant on Census Day is not protected by a privilege of confidentiality which would prevent its disclosure to the City and County of Denver, as the Census Act does not prohibit the Bureau from providing such a list to Denver nor does it prohibit Denver from obtaining such a list through judicial process.

The addresses of living units in Denver were not obtained from questionnaires. The Bureau deduced that some 16,600 living units in the City and County of Denver contained no persons from the non-return of the mail out-mail back questionnaire forms and from its follow-up procedures. The deduction of the Bureau that there were some 16,600 vacant living units in Denver on Census Day (J.A. 61) does not differ from its other more notable deductive conclusions such as what percentage of us have migrated in a northwesterly direction or what percentage of us have fewer than three bathrooms in our homes — deductions which the Bureau characterizes as "statistical" — yet deductions that are also concluded from census data and deductions which are freely made public.

Denver does not seek any responses of census questionnaires which the Bureau may have used in

deducing that 16,600 living units were vacant. Denver does not desire to see the questionnaires, know the names or characteristics of respondents, nor what was responded. Denver simply wants to know the addresses of these units so that it can show that there were, in fact, people living in those living units who should have been counted, who should be considered in the uses that the census figures are put, especially regarding the allocation of legislative representation and the determination of the effect of a person's vote. The addresses were not obtained through the census questionnaire system.

Congress did not intend that this information be withheld. In *Cort* v. *Ash*, 422 U.S. 66 (1975) This Court set forth three factors for determining the congressional intent in enacting any particular legislation: the language of the statute, its legislative history, and the underlying purpose and structure of the statute.[8]

The words and phrases of §9 of the Census Act do not specify or imply any privilege, *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 277-278 (1929); especially when such a provision of the statute must be strictly construed, *St. Regis Paper Co.* v. *United States*, 368, U.S. 208, 218 (1961).

The Court of Appeals held that "[B]oth the history of the Census Act and the broad language of the confidentiality provisions of §9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that im-

[8] This Court has recently confirmed its analysis in divining congressional intent in order to determine whether to infer the right to contribution from the Equal Pay Act, 29 U.S.C. §206(d), and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2, *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S._____, 67 L.Ed2d 750, 101 S.Ct. 1571, 49 U.S.L.W. 4383 (decided April 20, 1981); and in order to determine whether the Davis Bacon Act, 40 U.S.C. 276(a) confers a private right of action for back wages, *Universities Research Association* v. *Coutu*, 450 U.S._____, 67 L.Ed.2d 662, 101 S.Ct. 1451, 49 U.S.L.W. 4354 (decided April 6, 1981).

munity that would assure confidentiality." *McNichols* v. *Klutznick*, 644 F.2d 844, 845 (1981). An examination of the express words and phrases used in the Census Act shows that the confidentiality provisions of the statute provides only that (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents to the census; and (3) no one without statutory authority may read individual reports.[9]

Denver will use these lists for precisely those statistical purposes for which that information is intended, i.e., to ensure an accurate count of the population of the City and County of Denver in the 1980 Decennial Census. Denver shall not, and does not ask that the Bureau, publish information which identifies respondents to the census; nor does Denver wish to read individual reports made to the Bureau by respondents during the 1980 Decennial Census.

The Bureau deduced that certain living units were vacant from its mail out-mail back and follow-up procedures. When the Bureau did not receive completed questionnaires from the living units to which they were mailed, temporarily employed and sparsely trained personnel from the Bureau attempted to determine the reason there was no response. Disclosing to Denver the addresses of those living units deduced to be vacant from the fact that the questionnaires were not mailed back and from the information gathered by these personnel will not necessitate, and will not lead to, disclosing the sources of the information gathered, much less the identities of those who provided the information. We must assume that the information did not come from the persons residing in the living units deemed to be vacant.

---

[9] *Carey, et al.* v. *Klutznick, et al.*, No. 81-6042, Slip op. at 3 of concurring opinion of Judge Stewart (2nd Cir. June 12, 1981).

The Court of Appeals erred in admittedly allowing a "liberal construction" of those confidentiality provisions of the Census Act, contrary to This Court's directions in *St. Regis Paper Co.* v. *United States, supra,* at page 218:

> . . . Ours is the duty to avoid a construction [of the Census Act] that would suppress otherwise competent evidence unless the statute, *strictly construed,* requires such a result. (Emphasis added)

The legislative history of §9 reveals the intention of Congress to assure that respondents will not be identified as a result of replying to the census. In *St. Regis Paper Co.* v. *United States, supra,* This Court decided that, as then written, §9 did not protect copies of census questionnaires voluntarily retained by respondents. 368 U.S. at 218. Congress then enacted the paragraph following §9(a) (3) to overrule that case. The legislative history concerned with that amendment shows its limited purpose:

> The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . .

S. Rep No. 2218, 87th Cong., 2nd Sess. 2 (1962), *reprinted in* [1962] U.S. Code Cong. & Admin. News 3188, 3189. The Department of Commerce request for enactment of this measure stated that, with the requested amendment, ". . . a respondent will be free to give information to Census for statistical purposes only, without fear that a copy of the return can be demanded by a regulatory agency and used against the

respondent." Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Johnson, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3190, 3191. The relationship between respondents to the census and the Bureau is repeatedly emphasized in Secretary Hodges' letter. *Id.* The statutory response to *St. Regis Paper Co.* was thus confined to the narrow holding of the case.

Although the *St. Regis* Court was specifically concerned with the relative protection afforded census forms retained by respondents and those held by the Bureau, This Court stated that "the prohibitions against disclosure contained in §9 . . . do not purport to generally clothe census information with secrecy." 368 U.S. at 217-18. This Court analyzed each of the three subsections of 13 U.S.C. §9. *Id.* at 215-16. The strict construction given to §9 by This Court did not occasion any fundamental re-thinking or clarification of the statute. The statute could have been amended to include a blanket prohibition on dissemination of the information obtained by the Bureau from any source, for any purpose. But Congress did not do so. The Committee on Post Office and Civil Service of the House of Representatives expressly rejected a statutory revision that would prevent use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. H.R.Rep.No. 2437, 87th Cong., 2nd Sess. 1-2 (1962); H.R.Rep.No. 10569, 87th Cong., 2nd Session (1962), printed in Hearing Before the Comm. on Post Office and Civil Serv., Confidentiality of Census Reports, 87th Cong., 2nd Sess. (1962).

The Court of Appeals cites only *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977) as authority for its liberal interpretation of an absolute interdiction of the confidentiality provisions of 13 U.S.C. §9. Unlike the instant case, the plaintiffs in *Seymour* were not seeking disclosure of census information for statistical pur-

poses; rather those plaintiffs sought names and addresses for the purpose of sending notices to potential class members in an anti-trust action. Moreover, the plaintiffs in *Seymour* sought disclosure not just of addresses but of the names and addresses of companies the Bureau had placed in twenty-one substantive categories. The categories described the businesses of the firms listed, and, hence, obviously reflected the information provided by the companies in the census reports, but more importantly, disclosed the identity of the respondents to the census questionnaires.

The concept that the confidentiality provision of the Census Act is restricted to the protection of the identities of the respondents has been propounded in the Federal District Courts. See *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958); *United States* v. *Littles*, 321 F.Supp 388 (D.Del 1971).

That the list of addresses of living units in the City and County of Denver deduced by the Bureau to be vacant on Census Day may be provided to the City and County of Denver for the purpose of assuring the most accurate enumeration of the population of the City and County of Denver as is possible is patent, not only because the Census Act does not prohibit the Bureau from providing such a list to Denver, but also since it is, according to the suppositions of the Bureau, information concerning non-existent persons.

That there are substantial constitutional rights at stake in this litigation was not only found and stated by the District Court (J.A. 115), but is also set forth and argued herein *supra:* every person's vote must be equal to another's to the greatest extent feasible. The District Court recognized that the fundamental rights involved here could not be subordinated to an administrative desire to avoid scrutiny and was correct. The Court of Appeals opted not to do so, electing instead to

stamp the rigid position of the Bureau as required by the 10th Circuit's liberal construction of the statute.

THE ORDER OF THE DISTRICT COURT DID NOT VIOLATE ANY PRIVILEGE

The District Court balanced the interests at stake in the issue of disclosing the list of vacant living units and found for Denver. In so doing, it also even-handedly provided conditions of disclosure which would, under *any* interpretation of the confidentiality provisions of the Census Act, satisfy the requirements of that statute.

The District Court determined that the withholding of the addresses of vacant living units would deny Denver any meaningful ability to challenge the Bureau's determinations of the population of the city and that the discovery of those addresses is clearly relevant and indispensable to Denver's case. The District Court further found that the purposes of Section 9 of Title 13 U.S.C. can be maintained, and conditioned and subjected the discovery order by (1) allowing the Bureau to provide lists of vacant units as opposed to the Follow-up Address Register itself, (2) allowing the Bureau to shield the identity of respondents to the census, (3) requiring the employees, officers and agents of the City who would have access to those addresses to be sworn to the same oath of secrecy as are personnel of the Bureau, (4) restricting access to the information to those persons so sworn to secrecy, (5) subjecting those persons to contempt of the Court for violation of the non-disclosure limitations, (6) restricting the use of the information to the seeking of the correct population figure for the city, (7) prohibiting the publication of the addresses, (8) allowing personnel of the Bureau to monitor and participate in the activities of Denver in using the information and (9) requiring Denver to pay

the expenses associated with the disclosure and the use of the information in the event that Denver fails to succeed in showing that its population exceeds 500,000.

Denver submits that this information shall be as secure as, if not more than, it is presently. The safeguards include not only those which may be applicable to personnel of the Bureau, but also the superintendence and order of the District Court. The integrity and the appearance of integrity of census data will be honored and will remain whole.

CONCLUSION

Your Petitioners pray the Judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed and the cause remanded to the Court of Appeals with instructions to vacate its stay of the Order of the U.S. District Court for the District of Colorado.

Respectfully submitted,

MAX P. ZALL
City Attorney
GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665

Counsel for Petitioners

July, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS,

VS.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS.

ORDER

The plaintiffs in this action challenge the population count reached by the Bureau of the Census for the City and County of Denver, Colorado. The plaintiffs filed a motion for temporary restraining order and a motion for preliminary injunction. In connection with those motions, the Court has heard extensive evidence regarding the Census Bureau's methodology and the City's challenges to the census count. The Court is therefore well acquainted with the issues ultimately to be raised on the merits.

In addition, the plaintiffs have filed a request for production of documents, together with a motion to have production expedited because of the short time period in which census challenges must be determined. In that request, the plaintiffs seek the "Follow-Up Address Registers" (FARs) and "any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver."

The thrust of the City's challenge to the census is directed to the Bureau's determination that there were over 16,000 vacant housing units in the City on April 1, 1980, the effective date of the census. The City's trained and experienced real estate assessment personnel have conducted actual checks of about one-third of Denver's residential real estate units, and as a result of that survey, the City contends that the Bureau has "over-counted" vacancies by a factor of 46%. However, it has been impossible for the City to challenge the Bureau's finding that any particular housing unit was "vacant" on April 1, 1980 because the Bureau has declined to inform the City which units it counted as vacant. For the purpose of contesting the vacancy count, the City seeks to discover the list or register of those dwellings defined by the Bureau as "vacant" in the 1980 census. The Court therefore concludes that the request for production essentially relates only to the FARs, or other documents which contain the vacancy information, and this Order is directed only to those documents. The City has conceded that production of the FARs will satisfy the instant discovery request, despite the overbreadth of its original request for production.

The Bureau in refusing the discovery request, relies primarily on the contention that the information sought is confidential because it falls within the meaning and intent of 13 U.S.C. section 9. The Bureau argues that Congress provided for confidentiality of all census return information in order to assure voluntary compliance by census respondents so that accurate data can be compiled, and that section 9 prohibits the discovery here sought.

In response, the City contends that the purpose of the confidentiality provision would not be undercut by providing vacancy lists, since neither the names of

census respondents nor answers to census questions need be provided. In addition, the City argues that 13 U.S.C. section 9 does not bar this discovery because that section only prohibits "use [of] the information furnished for any purpose other than the statistical purpose for which it is supplied." The City asserts that this is precisely the purpose, and the only purpose, for which the information will be used.

The Court has considered carefully the foregoing arguments as well as the evidence presented by both sides in the substantial proceedings held to date. In particular, the Court has considered evidence presented by the Bureau which indicates that definitional differences between the parties as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City. Despite this evidence, it appears to the Court that there is no way that the actual effect of the definitional difference can be verified unless the City can discover the FARs, which will tell the City *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination. Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure 500,000 is a threshold of city size affecting both state and federal grants. The Bureau proposes a 1980 census for Denver just over 491,000, whereas Denver claims its population is over 500,000 and that the vacancies in dispute would make up the difference if fully counted. The Bureau has admitted that it undercounted by about 2.5% as a national average in 1970. Obviously

an adjustment of that magnitude also would put Denver over 500,000.

Considering the intent and purpose of the confidentiality requirements of 13 U.S.C. section 9, the Court concludes that the purposes of that section can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

Accordingly, it is

ORDERED that the defendants shall produce the FARs for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980;

ORDERED that the defendants shall delete from said information any and all names of persons or other references which might identify respondents to the census, either directly or indirectly;

ORDERED that every employee, officer, or agent of the City and County of Denver before having access to the information provided shall be sworn to the same oath of secrecy and confidentiality as required of personnel of the Bureau of the Census;

ORDERED that the plaintiffs shall not allow any person subject to their control and not subject to such oath access to the information made available hereunder;

ORDERED that a copy of this Order shall be served upon every employee, officer or agent having access to the information provided by the Bureau, and every such employee is hereby ORDERED not to disclose such information to anyone not subject to the oath of confidentiality;

ORDERED that the information provided pursuant to this Order shall not be used for any purpose except

to seek the correction or adjustment of the population figures for the City and County of Denver for the 1980 census;

ORDERED that the information provided hereunder shall not be publicized or made public in any way;

ORDERED that the defendants may at their option provide one more of their employees, officers or agents to accompany each employee, officer or agent of the plaintiffs in checking and verifying the April 1, 1980, status of occupancy or vacancy of the living units at issue, and in the event that the defendants elect to follow this procedure and the population of the City and County of Denver is ultimately determined to be under 500,000, the defendants may apply to the Court for reimbursement by the City of the reasonable and necessary expenses incurred in making this cooperative effort with the plaintiffs;

ORDERED that the plaintiffs, by accepting the information made available through this Order, accept as a condition thereof the foregoing Order regarding payment of the defendants' reasonable and necessary expenses;

ORDERED that this Order shall be effective immediately as of the date written below; provided, however, that enforcement of the Order is hereby stayed for a period of seven days from that date, and

ORDERED that a copy of this Order shall be served immediately on the United States Attorney for the District of Colorado.

Finally, the Court finds and concludes, pursuant to 28 U.S.C. section 1292(b), that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

DATED at Denver, Colorado, this 17 day of September, 1980.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN, Judge
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2023

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS-APPELLEES,

vs.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

John F. Cordes (Alice Daniel, Assistant Attorney General, and Leonard Schaitman, Attorney, Civil Division, Department of Justice; and Joseph F. Dolan, United States Attorney for the District of Colorado, with him on the briefs), Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

George J. Cerrone, Jr., Assistant City Attorney (Max P. Zall, Attorney for the City and County of Denver, with him on the brief), Denver, Colorado, for Plaintiffs-Appellees.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKay, Circuit Judge.

[Decided March 17, 1981]

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title,

> shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of the Census and by otherwise limiting any further publication of the ordered information.

---

[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. *See Seymour v. Barabba,* 559 F.2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver's population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b), (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizens is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us

to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN F. CORDES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether lists of addressees collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are privileged from disclosure in civil discovery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and rule involved	2
Statement	3
Summary of argument	11
Argument:	
Address lists compiled by the Bureau of the Census are privileged from disclosure in civil discovery	15
A. The Census Act prohibits disclosure of Census Bureau Address lists	16
B. Census Bureau address lists are absolutely privileged and thus are not subject to civil discovery	22
C. The privilege protecting Census Bureau address lists from disclosure does not offend the constitutional guarantee of equal representation	31
Conclusion	39

TABLE OF AUTHORITIES

Cases:

Association for Women in Science v. *Califano*, 566 F.2d 339	24
Baldrige v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981)	3, 11, 12, 16, 18, 20, 22, 30
Burns v. *Richardson*, 384 U.S. 73	37
Carey v. *Klutznick*, 653 F.2d 732	13, 25, 37
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102	25
Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268	33
FTC Line of Business Report Litigation, In re, 595 F.2d 685, cert. denied, 439 U.S. 958	28-29

Cases—Continued Page

Federation for American Immigration Reform (FAIR) v. *Klutznick*, 486 F. Supp. 564, appeal dismissed, 447 U.S. 916, aff'd on remand, No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981) 38
Freeman v. *Seligson*, 405 F.2d 1326 26
Gaffney v. *Cummings*, 412 U.S. 735 ..... 15, 33
Kirkpatrick v. *Preisler*, 394 U.S. 526 ..... 36, 37
Mahan v. *Howell*, 410 U.S. 315 38
Roviaro v. *United States*, 353 U.S. 53 33
St. Regis Paper Co. v. *United States*, 368 U.S. 208.. 13, 20, 26, 27, 28, 29, 30
Seymour v. *Barabba*, 559 F.2d 806 ..... 18, 19, 25
Totten v. *United States*, 92 U.S. 105 33
Trammel v. *United States*, 445 U.S. 40 32
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 ..... 29, 30, 35-36
United States v. *Coplon*, 185 F.2d 629, cert. denied, 342 U.S. 920 ..... 32, 33
United States v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 68,383 36
United States v. *O'Neill*, 619 F.2d 222 24
United States v. *Reynolds*, 345 U.S. 1 ..... 23, 33
United States v. *Turkish*, 623 F.2d 769, cert. denied, No. 80-436 (Jan. 12, 1981) 32
Wesberry v. *Sanders*, 376 U.S. 1 36
Young v. *Klutznick*, 652 F.2d 617 38

Constitutions, statutes, and rules:

United States Constitution:
Article I, Section 2 3
Fourteenth Amendment, Section 2 ..... 3, 36-37
Colo. Const. art. V, § 48(1)(a), (e) 39
Census Act, 13 U.S.C. 1 *et seq.*:
13 U.S.C. 1(3) 19
13 U.S.C. 6(c) 19
13 U.S.C. 8 6
13 U.S.C. 8(b) 2, 12, 17, 18, 19, 20, 21, 26
13 U.S.C. 9 ..... 6, 11, 17, 25, 28, 30
13 U.S.C. 9(a) 2, 12, 17, 21, 26
13 U.S.C. 9(a)(1) 12, 18, 26

Constitutions, statutes, and rules—Continued Page

13 U.S.C. 9(a)(2) 12, 18, 19
13 U.S.C. 21 3
13 U.S.C. 23(c) 17
13 U.S.C. 141(a) 3
13 U.S.C. 141(c) 37
13 U.S.C. 214 ..... 17, 31
13 U.S.C. 301 26
13 U.S.C. 302 26
28 U.S.C. 1292(b) 10
Colo. Rev. Stat. (1980):
§§ 2-1-101 *et seq.* 39
§§ 2-2-101 *et seq.* 39
Fed. R. Civ. P.:
Rule 26 25
Rule 26(b) 2, 23
Rule 26(b)(1) 13, 23
Fed. R. Evid. 501 24

Miscellaneous:

Bureau of the Census, *Current Population Reports, Federal-State Cooperative Program for Population Estimates, Series P-26*, Nos. 17 (Feb. 1973), 62 (Apr. 1974), 103 (Apr. 1975), 75-6 (Aug. 1976), 76-6 (July 1977), 77-6 (Apr. 1979), 78-6 (Nov. 1979) 7-8
C. Kaplan & T. Van Valey, *Census '80: Continuing the Factfinder Tradition* (Department of Commerce 1980) 21
H.R. Rep. No. 2437, 87th Cong., 2d Sess. (1962) 28
10 *Moore's Federal Practice* (2d ed. 1979) 25
Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142 (1976) 26
Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973) 24
S. Rep. No. 2218, 87th Cong., 2d Sess. (1962) 28
8 J. Wigmore, *Evidence* (McNaughton rev. 1961) 24, 25
8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1970) 24

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1781

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. Br. App. B-1 to B-5)[1] is reported at 644 F.2d 844. The order of the district court (Pet. Br. App. A-1 to A-6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1981. The petition for a writ of certiorari was filed on April 24, 1981, and was granted on June 15, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "Pet. Br. App." refers to the appendix to petitioners' brief on the merits.

STATUTES AND RULE INVOLVED

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Rule 26(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to

the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT

1. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, mandates that the members of the House of Representatives "be apportioned among the several States * * * according to their respective Numbers, which shall be determined * * * [by] actual Enumeration * * * every * * * ten Years, in such Manner as [Congress] shall by law direct." Pursuant to this authority, Congress directed the Secretary of Commerce (through the Bureau of the Census) to conduct a census of the population on April 1, 1980. 13 U.S.C. 141(a), 21.

In the course of carrying out its duties in connection with the 1980 decennial census, the Census Bureau prepared master address registers for each of some 300,000 enumeration districts in the country.[2]

[2] As we have explained in our brief in *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981) (at 3 n.1), an "enumeration district" is a small geographical area established by the Census Bureau as a basic unit for data collection and tabulation. We are sending petitioners and amici copies of our brief in *Baldrige* v. *Shapiro*.

The lists of addresses included in the master address registers were developed initially through the use of commercial mailing address lists, census postal checks, and preenumeration canvassing by census personnel (J.A. 44-45). The Bureau mailed out its questionnaires to all addresses on the master registers for response on or about the census date, April 1, 1980 (J.A. 45-46). At the national level, about 85% of the households returned their questionnaires (J.A. 44). Thereafter, in a procedure known as "Followup One," Census Bureau employees visited each address from which a questionnaire was not returned, conducted interviews where possible, and, as to the remaining addresses, compiled information on whether the dwelling units at those addresses were occupied or vacant (J.A. 46-47). The census enumerators did not classify a unit as "vacant" without verifying the unit's status through personal interviews with either property owners or neighbors (J.A. 48, 50). In addition, the enumerators added to their master registers newly observed units that had not been previously listed, and sought personal interviews with the occupants of those units (J.A. 47).[3]

After completion of Followup One, the Census Bureau provided preliminary working figures to the City of Denver, indicating an initial population count of approximately 455,000 (J.A. 47, 56). These working figures were submitted as part of the Bureau's Local Review Program, which afforded

---

[3] In determining whether a particular building should be classified as residential, census personnel were instructed to list every structure, regardless of its condition, unless it was obvious that the structure had no space devoted to residential use (*e.g.*, a commercial establishment, a barn, a garage with no living quarters above it) (J.A. 49).

local government officials an opportunity to review and comment on the Bureau's housing tabulations before those figures became final (9/15/80 Tr. 124). Under the program, local officials had 10 working days to submit any data demonstrating inaccuracies or other problems with the Bureau's figures (J.A. 52-55; Def. Exh. C).[4] The City challenged the Bureau's figures with respect to the number of vacant housing units, claiming that the Bureau misclassified housing units as vacant by a factor of 46% (J.A. 35, 83-84). In addition, the City requested the Bureau to furnish it with address lists of vacant housing units so that the City could "determine the validity of [the Bureau's] data" (J.A. 83). The Bureau asserted that the differences between its vacancy figures and the City's were largely attributable to substantial differences in definition and methodology (J.A. 69-72, 85-86)[5] and refused to disclose its address lists of vacant units,

---

[4] The Census Bureau provided local governments with aggregate information for each enumeration district, including the number of housing units, the number of vacant housing units, population totals and population per household totals (J.A. 47). The local governments were afforded the opportunity to analyze the census housing data in light of data available to the local governments and to identify suspected discrepancies at the enumeration district level (9/15/80 Tr. 124).

[5] For example, the Bureau noted that "housing units under construction but with the interior protected from outside elements are classified as vacant in the census, while local vacancy estimates frequently do not include housing units under construction. In addition, housing units occupied by persons with a usual residence elsewhere are classified as vacant by census definition. They are seldom included in local vacancy estimates" (J.A. 85-86).

claiming that the lists contain information, "such as house numbers and street addresses," that are subject to the confidentiality provisions of the Census Act, 13 U.S.C. 8 and 9 (J.A. 86).

While the City and the Bureau were engaged in the local review process, the Bureau conducted "Followup Two," in which different, specially-trained enumerators visited all units originally listed as vacant or unclassified as well as units with respect to which information previously obtained was determined to be inaccurate or incomplete (J.A. 48-52). Upon the completion of Followup Two, the Bureau issued a revised population count for the City of Denver of 491,651, an increase of approximately 36,000 from the initial figures (J.A. 57).[6]

2. On September 3, 1980, petitioner McNichols, the Mayor of Denver, and the City and County of Denver filed this action for declaratory and injunctive relief in the United States District Court for the District of Colorado (J.A. 1, 7-23).[7] Petitioners alleged that the Census Bureau's vacancy rate for Denver was arbitrary and unreasonable and that the Bureau's population figures for Denver accordingly reflected a substantial undercount of the City's popu-

---

[6] The local review program contributed only 504 additional people to the revised population figure (J.A. 56). As part of its response to the City's challenge to the Bureau's vacancy figures, the Bureau had its employees conduct a third check of vacancies in selected areas; no errors were uncovered (J.A. 55-56, 63-68).

[7] The complaint named as defendants the Secretary of Commerce, the Department of Commerce, the Bureau of the Census and the Bureau's director and regional director (J.A. 7, 9).

lation (J.A. 12-16).[8] As a result, petitioners contended, Denver would be underrepresented in Con-

---

[8] In support of their theory of a substantial Census Bureau undercount of Denver's population, petitioners relied in part on population estimates and projections prepared by the Denver Regional Council of Governments (DRCOG), which showed that the population of Denver grew from 514,800 recorded in the 1970 census to more than 520,000 in 1977 through 1980 (J.A. 41; see Pet. Br. 7). The Bureau's own population estimates for Denver during the 1970's (which were based on three independent estimating techniques), however, reflected a steady decline in population to well under 500,000. The table below contains the Bureau's population estimates for Denver from 1971 through 1979:

ESTIMATES OF THE POPULATION FOR THE CITY AND COUNTY OF DENVER, COLORADO: JULY 1, 1971 THROUGH JULY 1, 1979

(Estimates rounded to the nearest hundred)

Year	Census Bureau Estimate
July 1, 1971	518,100
July 1, 1972	514,100
July 1, 1973	515,600
July 1, 1974	504,200
July 1, 1975	486,500
July 1, 1976	484,300
July 1, 1977	477,600
July 1, 1978	474,700
July 1, 1979 (provisional)	472,500

The figures for 1971 through 1977 come from Bureau of the Census, *Current Population Reports, Federal-State Cooperative Program for Population Estimates, Series P-26* (hereinafter, "*Current Population Reports, Series P-26*") No. 17, at 3 (Feb. 1973); *Current Population Reports, Series P-26*, No. 62, at 3 (Apr. 1974); *Current Population Reports, Series P-26*, No. 103, at 3 (Apr. 1975); *Current Population Reports, Series P-26*, No. 75-6, at 3 (Aug. 1976); *Current Population Re-*

gress and in the state legislature because under Colorado law apportionment of congressional districts and state legislative districts is based on the official census count (J.A. 10-12, 16). Petitioners also claimed that because of the Census Bureau's alleged undercount, Denver would be deprived of certain federal funds to which it otherwise would be entitled under federal grant-in-aid programs that distribute benefits on the basis of population (J.A. 12, 16). The complaint requested, *inter alia*, that the district court (1) declare the Bureau's methods of conducting the census and computing the popula-

---

ports, Series P-26, No. 76-6, at 3 (July 1977); *Current Population Reports, Series P-26*, No. 77-6, at 3 (Apr. 1979); *Current Population Reports, Series P-26*, No. 78-6, at 3 (Nov. 1979). The figures for 1978 and 1979 have been released for general statistical use but have not yet been released in published form.

The Census Bureau has informed us that the differences between its estimates and those of the DRCOG are attributable to a variety of factors, including the use of different methodologies and different data reflecting population change. The most significant limitation in the methodologies employed by the DRCOG is that the DRCOG estimates depend heavily on 1960-1970 population trends and relationships. However, demographic patterns during the 1970's were considerably different from those observed in the 1960's. For example, the average size of household dropped dramatically in the 1970's as the trend toward single and childless couple households increased. The "housing unit" method used by DRCOG, which is based on many factors derived from 1960-1970 trends, fails to take into account the decline in household size and the increase in demolitions and abandonments that took place during the 1970's. Similarly, the "auto registration" method utilized by DRCOG is also based on trends observed during the 1960's, and overlooks the increased trend toward multiple automobile ownership during the 1970's.

tion figure for Denver to be unreasonable and invalid; (2) grant petitioners a right of access to the "records, data and information" on which the Bureau's vacancy rate for Denver was based; (3) require the Bureau to accept and take into consideration the data provided by Denver concerning the City's vacancy rate; and (4) determine Denver's vacancy rate (J.A. 21-22).[9]

While the case was pending in the district court, petitioners filed a request for production of the Census Bureau's updated address list, known as the Followups Address Registers (FARs) (J.A. 111-112).[10] The Bureau argued in response that the FARs were privileged from disclosure under the confidentiality provisions of the Census Act (Pet. Br. App. A-2).

---

[9] Petitioners initially sought a temporary restraining order keeping open the Census Bureau's Denver offices. The parties agreed, however, that the offices could be closed so long as the Bureau kept its records in Denver for the duration of the lawsuit (J.A. 31-32). Petitioners then sought a preliminary injunction requiring, in essence, that the Bureau cooperate with the City in verifying the Bureau's vacancy data (J.A. 74-75). The district court has not yet ruled on the request for a preliminary injunction.

[10] As we have explained above (page 4, *supra*), the original master address registers were developed from commercial mailing lists, from postal checks and from preenumeration canvassing. The FARs, which are similar to the master registers, contain additional information received in response to the census questionnaires and to the followup interview programs. None of the information concerning the vacant or occupied status of housing units was recorded on the FARs without verification through either the questionnaires or followup interviews. Petitioners are therefore in error in asserting (Br. 16) that the Census Bureau's figures concerning vacant units are the result of "deduction."

On September 17, 1980, the district court rejected the Bureau's confidentiality claim and granted petitioners' discovery request (Pet. Br. App. A-1 to A-6). The court reasoned that petitioners would not be able to verify the Bureau's vacancy figures "unless [petitioners] can discover the FARs, which will tell [petitioners] *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny [petitioners] discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination" (*id.* at A-3; emphasis in original). Accordingly, the court issued an order providing, *inter alia*, that (*id.* at A-4 to A-5):

> (1) respondents must produce the FARs for Denver, or, alternatively, a list of vacant addresses derived from the FARs;
>
> (2) all names and references that might identify census respondents must be deleted;
>
> (3) all City employees given access to the information must take the same secrecy oath as Census Bureau employees (see 13 U.S.C. 23(c));
>
> (4) the information obtained may not be used for any purpose except to seek adjustment of the 1980 census figures for Denver; and
>
> (5) Census Bureau officials may at their option accompany City employees seeking to verify the Bureau's vacancy data.

On appeal,[11] the court of appeals reversed (Pet. Br. App. B-1 to B-5), holding that the district court's

[11] The district court certified its order for immediate appeal under 28 U.S.C. 1292(b) and issued a temporary stay (J.A. 117). The court of appeals allowed the interlocutory appeal and continued the stay of the district court's disclosure order (J.A. 118-119).

discovery order violated the confidentiality provisions of 13 U.S.C. 9. The court concluded that "Congress has the power to make census information gathered at its direction immune from discovery" and that "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (Pet. Br. App. B-4). In rejecting petitioners' argument that they are entitled to the information because without it they would be unable to mount a meaningful challenge to the Bureau's population count for Denver, the court observed that "Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument" (*ibid.*). In light of the unequivocal congressional bar to disclosure of raw census data, the court of appeals ruled that the district court was without authority to fashion protective devices purporting to preserve the confidentiality mandated by statute (*ibid.*).

SUMMARY OF ARGUMENT

In *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981), this Court granted review to consider whether Census Bureau address lists must be disclosed to local government officials pursuant to a Freedom of Information Act request. Many of the arguments against disclosure of census material in the FOIA context are pertinent to the closely related issue presented in this case: whether local officials are entitled to disclosure of Census Bureau address lists pursuant to a discovery request made in the course of

a civil action challenging the census count for a particular locality. In both cases, disclosure of the Bureau's address lists would be contrary to the intent of Congress, as expressed in the confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), to prohibit Census officials from disclosing all raw census data, including addresses, that relate to particular individuals. Petitioners and amici offer no convincing reasons for disregarding the clear intent of Congress.

A. As we have discussed in our brief in *Baldrige* v. *Shapiro*, *supra*, lists of addresses compiled by the Census Bureau in the course of conducting the census are within the confidentiality mandate of the Census Act. There is no merit to petitioners' contention that disclosure of the Bureau's address lists is not barred by the Census Act because petitioners intend to use the information for a "statistical purpose," under 13 U.S.C. 9(a)(1). The release of raw census data to a person outside the Census Bureau in order to facilitate a challenge to the accuracy of the census is not one of the "statistical purposes for which [the data are] supplied," within the meaning of 13 U.S.C. 9(a)(1). In any event, even if petitioners' proposed use is a proper "statistical" purpose under Section 9(a)(1), disclosure is nevertheless barred by the other confidentiality provisions of the Act, 13 U.S.C. 8(b) and 9(a)(2).

Nor is there merit to petitioners' claim that the confidentiality provisions of the Census Act are designed merely to protect the identities of census respondents. Section 9(a)(2) states unequivocally that the Secretary of Commerce may not make any publication of census material that could identify "the *data* furnished by any particular establishment or individual." 13 U.S.C. 9(a)(2) (emphasis added).

Finally, petitioners err in asserting that the Census Act does not bar disclosure because no harm will result from divulging a bare list of addresses. Disclosure of the Bureau's master address registers—or a list of vacant dwelling units derived from the registers—would reveal to local officials that particular buildings are used for residential purposes and that particular units not included on the list of vacant dwellings are occupied. Release of this information, which is ordinarily confirmed by or on behalf of census respondents during the enumeration process, could uncover the existence of housing violations and would undermine the purpose of the Census Act's confidentiality provisions.

B. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party may discover any relevant matter that is "not privileged." A privilege may be established by constitutional provision, by statute, or by common law rule. As the Advisory Committee's Notes to the portion of the Federal Rules of Evidence concerning privileges confirm, the Census Act establishes a privilege barring official disclosure of census information in judicial proceedings.

St. Regis Paper Co. v. *United States*, 368 U.S. 208 (1961), strongly supports the view that raw census data relating to individual census respondents are absolutely privileged from disclosure by census officials. In the course of "strictly construe[ing]" the Census Act, the Court observed that Congress had restricted the use of census information "while in the hands of * * * government officials." 368 U.S. at 218. The court of appeals below (Pet. Br. App. B-4) and the Second Circuit in *Carey* v. *Klutznick*, 653 F.2d 732, 738 & n.29 (1981), therefore correctly concluded that the Census Act's confidentiality provisions absolutely bar discovery of Census Bureau address lists.

Furthermore, nothing in the language or history of the Census Act suggests that Congress contemplated that the confidentiality requirements of the Act could be overcome whenever a litigant asserted a need for census information in civil discovery. Little purpose would be served by the Act's elaborate confidentiality protections if, as petitioners argue, local government officials need only file a lawsuit challenging the census results, and perhaps agree to have its representatives sworn to secrecy, before they could have access to raw census data. Such unrestricted access in selected cases would also frustrate the congressional intent to ensure candor so essential to the success of the census process.

C. Petitioners contend that recognition of an absolute privilege prohibiting disclosure of the Census Bureau's address lists would effectively impede their ability to challenge the accuracy of the census count, thus diluting Denver's voting strength in Congress and in the state legislature and depriving Denver's residents of their constitutional right to equal representation. This argument is insubstantial for several reasons.

To begin with, there is no basis for asserting the denial of a constitutional right merely because a privilege has made a party's proofs more difficult or impossible. Privileges by definition deprive parties and the courts of relevant information. However, once a privilege has been recognized in law because it serves to achieve a greater social benefit, the parties must attempt to prove their case without the privileged information.

Second, petitioners are simply incorrect in asserting that the address lists are indispensable to their challenge to census accuracy and that they are therefore entitled to the lists because their need for the infor-

mation outweighs the Census Bureau's need to keep the information confidential. During the local review program, the Bureau provided Denver with housing and vacancy figures for each enumeration district within the city. Denver was free to develop evidence controverting the Bureau's figures.

Finally, petitioners' right to equal representation is not violated by recognizing a privilege for Census Bureau address lists. The Court has recognized that census results "are inherently less than absolutely accurate" (*Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973)), and it has never suggested that the constitutional principle of "one man, one vote" requires precision in the census count. Moreover, petitioners do not claim that the State of Colorado would receive additional seats in Congress if the alleged undercount for Denver were corrected, and there is no requirement that the state legislature rely upon the census figures in apportioning congressional and legislative districts within Colorado. Accordingly, petitioners cannot show that the failure to reveal confidential census information would result in the denial of their right to equal representation.

ARGUMENT

ADDRESS LISTS COMPILED BY THE BUREAU OF THE CENSUS ARE PRIVILEGED FROM DISCLOSURE IN CIVIL DISCOVERY

In this case, petitioners, a local governmental entity and its chief public official, initiated a civil action challenging the 1980 decennial census results for their locality. Thereafter, in the course of the lawsuit, petitioners filed a discovery request, seeking disclosure of address lists compiled and used by the

Census Bureau in conducting the census. The disclosure issue presented here is thus very similar to that presented in *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981), where a local government official seeks access to Census Bureau address lists under the Freedom of Information Act. The government's brief in *Baldrige* v. *Shapiro*, *supra*, sets forth our position that Congress intended to prohibit the Secretary of Commerce and his agents from disclosing all raw census material relating to individuals, including address lists, and that such lists are therefore exempt from disclosure under the FOIA. No different result should obtain here, where disclosure of the same type of census material—Census Bureau address lists—is sought in civil discovery.

A. The Census Act Prohibits Disclosure of Census Bureau Address Lists

Compilation of accurate census data in a nation as vast and diverse as the United States could not be achieved without widespread cooperation among residents of every geographical area and members of every racial, ethnic and economic group. As we have argued at length in our brief in *Baldrige* v. *Shapiro*, *supra* (at 14-38), the language and legislative history of the Census Act, the histories of the FOIA and the Privacy Act, the Census Bureau's longstanding administrative interpretation and important policy considerations all persuasively demonstrate that raw census data relating to individual persons or establishments, including address lists, may not be disclosed to any person or governmental agency outside the Census Bureau.[12] Any such release of Census Bureau

[12] So far as is practicable, we rely on the discussion in our *Baldrige* v. *Shapiro* brief without repeating it here.

address lists would erode public confidence in the confidentiality of census data and thus would subvert the legislative goal of securing maximum voluntary cooperation with the census.

Section 8(b) of the Census Act states unequivocally that the Secretary of Commerce may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not (1) "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," (2) "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified," or (3) "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 3(a).[13] These sweeping provisions prohibit the disclosure of all raw census data relating to individual respondents, including addresses of particular respondents. In other words, under the statutory scheme, only aggregate statistical data may be disclosed to the public, and then only if such disclosure would not reveal information relating to a particular respondent or establishment.

Petitioners argue (Br. 18), however, that their intended use of the census information—to facilitate a challenge to the Bureau's census count for a particular locality—is for a "statistical purpose[] for

[13] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). Violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

which that information is supplied" under 13 U.S.C. 9(a)(1), and that therefore disclosure of this data is outside the purview of the Census Act's confidentiality mandate. This argument, which is identical to one adopted by the district court in *Baldrige* v. *Shapiro*, *supra*, should be rejected for the reasons set forth in our brief in that case (at 21-24). Briefly, even if release of the Bureau's address lists would not violate Section 9(a)(1), it would run afoul of both Section 8(b), which bars disclosure of "information reported by, or on behalf of, any particular respondent," and Section 9(a)(2), which prohibits the publication of census data in a manner that could identify the information furnished by any particular establishment or individual. Nothing in the language of Section 9(a)(1) suggests that census material that is subject to the prohibitions against disclosure in other parts of the statute may be released merely because the material is to be used for "statistical purposes." In any event, Section 9(a)(1) plainly limits the use of raw census data to *Bureau* personnel for the *Bureau's* own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census. Thus, as the court of appeals correctly concluded (Pet. Br. App. B-4 to B-5), release outside the Bureau of raw data relating to individual respondents, for the purpose of facilitating a challenge to census statistics, is not a "statistical purpose[] for which [the data are] supplied," within the meaning of Section 9(a)(1). See *Seymour* v. *Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977).

Petitioners also contend (Br. 18, 19, 21) that the Census Act merely prohibits disclosure of informa-

tion that identifies individual census respondents and that a list of addresses, which does not reveal a respondent's identity, is not subject to the Act's confidentiality provisions. If this were indeed the intended meaning of the Act, it would have been easy enough for Congress to enact a statute prohibiting the release of information that might identify census respondents. Section 9(a)(2), however, bars the publication of census material in a fashion that could identify "the *data* furnished by any particular establishment or individual." 13 U.S.C. 9(a)(2) (emphasis added). Thus, contrary to petitioners' contention, this provision is not limited to protecting the identities of census respondents, but extends to *information* (other than in aggregate form) supplied by *any* establishment or individual.

Furthermore, other provisions of the Census Act reflect the unequivocal intent of Congress to assure the public that raw census data will be kept strictly confidential, regardless whether the information was supplied by "sources other than the specific [respondents]." *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Section 6(c) of the Act directs the Secretary, to the maximum extent possible, to obtain information from other federal agencies, local governmental entities and private sources, instead of conducting direct inquiries. 13 U.S.C. 6(c). The Census Act defines "respondent" as any corporation, individual, or other organization or entity that "reported" information, "*or on behalf of which information was reported*," in response to a questionnaire, inquiry, or other request of the Bureau. 13 U.S.C. 1(3) (emphasis added). Section 8(b), in turn, permits the release of only those statistical materials "which do not disclose the information reported by, or on behalf

of, any particular respondent * * *." 13 U.S.C. 8(b) (emphasis added). By expressly applying the confidentiality mandate not only to information "reported by" respondents, but also to information reported "on behalf of" respondents, Congress clearly expressed its desire to protect all raw census data pertaining to individual census respondents.

Moreover, both Congress and the executive officials responsible for conducting the census have repeatedly expressed the view that all raw census data, including address lists, must be kept strictly confidential. We have reviewed the relevant historical materials in our brief in *Baldrige* v. *Shapiro* (at 16-18, 25-33) and we rely upon that discussion here, except to note that in arguing that the Census Act does not bar disclosure in this case, petitioners and amici virtually ignore this strong evidence of congressional intent.[14]

Finally, petitioners assert (Br. 17) that the lists of addresses that it seeks to inspect were not compiled "through the census questionnaire system," and they contend (Br. 21) that disclosure is not proscribed by the Census Act because no harm will result from divulging this information (see also MDL Amici Br. 24). As we have pointed out in our brief in *Baldrige* v. *Shapiro* (at 20-21, 36-37), however, the Bureau's address registers reveal the residential status of each building listed and the number of dwelling units it contains. This is the type of information that is ordinarily confirmed by or on behalf

[14] Petitioners' only reference to the legislative history of the Census Act (Br. 19-20) concerns the amendment overruling this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961). As we show below (pages 28-29, *infra*), petitioners misread the import of this legislative history.

of census respondents in the course of the enumeration process. Moreover, disclosure of a list of addresses might reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes. Even if the address registers could readily be redacted to produce a list of vacant housing units, disclosure of such a list would be contrary to both the letter and the spirit of Sections 8(b) and 9(a) of the Census Act. By disclosing the addresses of vacant units, the Bureau necessarily would also be revealing to local officials which units are occupied, thus enabling those officials to discover cases of unlawful occupancy. By the same token, disclosure of the vacancy status of certain dwelling units might be contrary to the interests of certain individuals upon whom the Census Bureau relies for information. For example, property owners or neighbors might be willing to disclose to census enumerators that a particular residence is vacant, but would not want that information disseminated outside the Bureau, for fear that the information might have adverse consequences with respect to property values or insurance coverage. Accordingly, the release of such information, particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.[15]

---

[15] See C. Kaplan & T. Van Valey, *Census '80: Continuing the Factfinder Tradition* 81 (Department of Commerce 1980):

> There are some people who are suspicious that the information they give to the Bureau of the Census will somehow be used against them and hence they deliberately withhold information. For example, families with children who live in dwellings where children are not per-

B. Census Bureau Address Lists Are Absolutely Privileged And Thus Are Not Subject to Civil Discovery

As discussed above and in our brief in *Baldrige* v. *Shapiro*, Congress has established a policy of strict confidentiality with respect to all raw census data relating to individual respondents, including address lists. Petitioners nonetheless argue that they are entitled to discovery of the Bureau's address lists because those lists are assertedly relevant to the subject matter of the instant lawsuit. But nothing in the language or history of the Census Act suggests that Congress contemplated that the confidentiality requirements of the Act could be overcome whenever a litigant asserted a need for census information in civil discovery. Indeed, there would be little purpose to the Census Act's elaborate confidentiality protections if, as petitioners suggest, a local government need only file suit challenging the census results, and perhaps agree to have its representatives sworn to secrecy, before it would be entitled to rummage freely through raw census information. Any such widescale right of access to census data is completely incompatible with the Census Act's statutory scheme and underlying purpose.

The relaxed confidentiality rule advocated by petitioners for discovery in civil suits challenging the census results for a particular locality would diminish, if not eliminate altogether, public confidence in

---

mitted might fail to report them. Individuals who have entered the country illegally might fear detection and deportation and avoid being counted altogether. Others live in condemned houses and fear eviction or prosecution for trespassing if discovered. Still others have living arrangements that, if discovered, could result in the curtailment of their welfare or social security allowances.

the census process and would have the long-term effect of reducing the accuracy of future censuses by deterring numerous individuals from cooperating in the census. Certain individuals, particularly those who believe they have something to hide from local authorities (see page 21, *supra*), are unlikely to distinguish among voluntary Census Bureau disclosures of census information, FOIA disclosures, and court-ordered disclosures in discovery proceedings. The result of any such disclosures, once they become known, will be the reluctance of many to participate at all in the census, or the preparation of misleading or inaccurate census responses. Only an absolute bar to all disclosures of raw census data is sufficient to assure census participants that their census communications are inviolate and that their census participation is risk-free. Since Congress has made absolutely clear its determination to obtain accurate census data through a governmental pledge of confidentiality, the Census Act's confidentiality guarantees must be read to extend to all types of disclosures that might impair cooperation, including disclosures in civil litigation.

The federal discovery rules recognize that Congress may enact legislation prohibiting discovery of certain materials. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party "may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action * * *" (emphasis added). The term "not privileged," as used in Rule 26(b), refers to "privileges" as that term is understood in the law of evidence. See *United States* v. *Reynolds*, 345 U.S. 1, 6 (1953). A privilege may be established by constitutional provision, by common law rule, or by

statute, such as a statute that makes certain government documents confidential. See *United States* v. *O'Neill*, 619 F.2d 222, 229 (3d Cir. 1980); *Association for Women in Science* v. *Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977). "Frequently statutes requiring particular kinds of reports to be made to the government will provide that such reports are to be kept confidential. Statutes of this kind are a bar to discovery * * *." 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2019, at 160 (1970). See 8 J. Wigmore, *Evidence* § 2377, at 781 (McNaughton rev. 1961).

Congress explicitly recognized the existence of such statutory privileges when it enacted the Federal Rules of Evidence. Rule 501 provides that the rules as to privileges in the federal courts shall be governed by common law principles, "[*e*]*xcept as* * * * *provided by Act of Congress*" (emphasis added). The Advisory Committee's Notes specifically identified the Census Act as one of the federal statutes that creates a privilege from disclosure in judicial proceedings:

> [P]rivileges created by act of Congress are not within the scope of these rules. These privileges do not assume the form of broad principles; they are the product of resolving particular problems in particular terms. Among them are included such provisions as 13 U.S.C. § 9, generally prohibiting official disclosure of census information and conferring a privileged status on retained copies of census reports * * *.

Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 231 (1973).[16]

---

[16] Although Congress made major revisions in the Advisory Committee's draft of Rule 501, the introductory state-

In light of the overwhelming evidence of Congress' intent to prohibit official disclosure of all raw census data, both the court of appeals below (Pet. Br. App. B-4) and the Second Circuit in *Carey* v. *Klutznick*, 653 F.2d 732, 739 & n.29 (1981), correctly concluded that the Census Act's confidentiality provisions absolutely bar discovery of Census Bureau address lists. Cf. *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808 (13 U.S.C. 9 "is a flat barrier to disclosure with no exercise of discretion permitted"). Thus, even if the material in question may be "relevant" to the subject matter of this lawsuit, that does not make the material any less "privileged." Under Rule 26, only matter that is "not privileged" may be subject to civil discovery. Accordingly, there is no merit to petitioners' argument that the address lists are disclosable in civil discovery.[17]

---

ment of the rule, excepting from its scope statutorily enacted privileges, was not changed. Accordingly, the Advisory Committee's Notes to its draft rule are pertinent in examining the rule in its final form. See 10 *Moore's Federal Practice* § 501.02 (2d ed. 1979).

[17] Amici contend (MDL Br. 17-19; N.Y. Br. 20-22) that the Census Act cannot be construed as creating an absolute privilege protecting address lists from civil discovery because the Act does not specifically concern itself with "disclosure" in judicial proceedings. This semantic contention, focusing on the difference between "publication" and "disclosure," is insubstantial and has been rejected by the Court in other contexts where, as here, Congress clearly sought to prohibit the release of certain information, however accomplished. See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Moreover, while a claim of statutory privilege demands that "[t]he words of the particular statute * * * be very closely examined with awareness that the courts are reluctant to find a privilege where not required * * * to do so" (8 J. Wigmore, *supra*, § 2377, at 781; footnote omitted), it is not true that the

This Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), strongly sup-

---

privilege must invariably be an express one. On the contrary, a privilege may in appropriate circumstances be implied from a statute's language and purpose. *Ibid.* Unlike cases such as *Freeman* v. *Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), relied upon by amici (MDL Br. 18-19; N.Y. Br. 22), where the statute at issue only prohibited "publication" of certain information, the Census Act, in addition to barring the Secretary from making a publication that might identify "data furnished by any particular establishment or individual," also prohibits the Secretary from "using" census information "for any purpose other than the statistical purposes for which it is supplied" (13 U.S.C. 9(a)(1)) and from "disclos[ing] the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). Indeed, this Court in *St. Regis Paper Co.* v. *United States*, *supra*, 368 U.S. at 218, assumed that census information in the hands of the Census Bureau is immune from legal process despite the absence of specific language in the Census Act prohibiting disclosure in judicial and administrative proceedings. In addition, amici's reference (MDL Br. 17 n.12; N.Y. Br. 21 n.19) to 13 U.S.C. 302, which authorizes the Secretary of Commerce to promulgate rules governing "confidentiality, publication, or disclosure" of information collected pursuant to 13 U.S.C. 301 pertaining to exports and imports, is unavailing. Section 301 is an elaborate disclosure statute, detailing the types of information to be reported. In contrast, Sections 8(b) and 9(a) allow only very limited disclosure of census information and strictly prohibit disclosure, publication and use beyond those statutorily-defined limits. Thus, unlike Section 302, where Congress left to the Secretary the task of setting limits on disclosure, in Sections 8(b) and 9(a) Congress incorporated rigid restrictions on disclosure into the statute itself.

Alternatively, amici argue (MDL Br. 23 n.15; N.Y. Br. 25-27) that the Census Act provides only a "qualified privilege," permitting the courts to balance the Bureau's confidentiality concerns against a party's litigation needs. As one commentator has noted, however, "the balancing process is unavailable as a mechanism for discretion when the alleged

ports our submission that the confidentiality provisions of the Census Act establish an absolute privilege against disclosure by census officials of raw census data relating to individual respondents. Although the Court in *St. Regis* ruled that the Census Act as it then existed did not immunize from legal process copies of census reports retained by private businesses, the decision did not question the statutory obligation of Census Bureau personnel to preserve the confidentiality of census information. Indeed, in the course of "strictly construing" the Census Act, the Court emphasized that Congress had restricted the use of census information "while in the hands of those persons receiving them, *i.e.*, the government officials." 368 U.S. at 218. Because it found that "the prohibitions against disclosure contained in § 9 run only against the officials receiving such information" (368 U.S. at 217), the Court refused to extend the privilege created by the Census Act to reporting companies that were not legally required, but had voluntarily chosen, to retain copies of their census reports. The Court noted that its conclusion was buttressed by the fact that the reporting companies were compelled by statute to furnish the same information contained in the reports to other government agencies in response to adminstrative subpoenas. 368 U.S. at 219-220.

---

privilege is statutory. If the document at issue falls within the ambit of the statutory provision, the need of the litigant—no matter how great—is of no consequence." Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 152 (1976) (footnote omitted). In any event, even if the Court accepts amici's balancing approach, petitioners have not demonstrated that their need for the address lists outweighs the compelling public policies underlying the Census Act's confidentiality provisions. See pages 34-36, *infra*.

Following the decision in *St. Regis*, Section 9 of the Census Act was amended to make explicit Congress' intent to immunize from legal process copies of census reports retained by census respondents. Petitioners point out (Br. 20) that in enacting this amendment Congress specifically rejected a provision that would have prevented use of "any [census] information, reports and other data" in judicial and administrative proceedings. But the rejection of this language does not reflect a congressional intent to permit raw census data in the possession of the Census Bureau to be subject to discovery in civil litigation. On the contrary, the 1962 legislation was intended merely to overrule *St. Regis*, and accordingly, the language of the amendment focused on copies of reports held outside the Census Bureau. See S. Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962); H.R. Rep. No. 2437, 87th Cong., 2d Sess. 2, 3-4 (1962). Since *St. Regis* did not question, and indeed endorsed, the Bureau's own statutory obligation to keep census information confidential, there was no need for Congress to legislate on that subject.

In addition, petitioners ignore the fact that Congress rejected the proposed prohibition on disclosure of "any [census] information, reports, and other data" at the urging of several government officials, who stated that "care must be taken not to extend confidentiality to such an extent as to interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information." H.R. Rep. No. 2437, *supra*, at 5 (letter of Phillip S. Hughes, Assistant Director for Legislative Reference, Bureau of the Budget); see *id.* at 7 (letter of Secretary of Commerce Hodges); *id.* at 8 (letter of Deputy Attorney General Katzenbach); *id.* at 10, 11 (letters of Federal Trade Commission Chairman Dixon). See also *In re FTC Line of Busi-*

ness Report Litigation, 595 F.2d 685, 699-700 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978). Thus, the legislative history on which petitioners rely merely shows that Congress declined to provide blanket immunity from legal process, with respect to information provided to the Census Bureau, to every individual and establishment that responded to the census.[18] The approach adopted by Congress was fully consistent with this Court's recognition in *St. Regis* that census respondents are obligated, in response to subpoenas or other legal process, to provide the requested information even if that information previously had been included in their census reports. 368 U.S. at 219-220. Thus, both the *St. Regis* decision and the amendment overruling that decision are in accord with our submission that raw census data in the possession of the Census Bureau—in contrast to information in the possession of census respondents—is absolutely privileged and may not be disclosed in response to a discovery request.

Similarly, in *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958), two steel companies sought to condition their compliance with a government discovery request in an antitrust suit on the government's willingness to turn over to them census reports filed by other major steel producers. In rejecting the defendant steel companies' position, Judge Weinfield held that

---

[18] As the letters from the government officials suggest, adoption of the proposed language would have led to absurd results. For example, if an individual census respondent were a party to a lawsuit, the individual could have refused to provide his name, address and any other pertinent information that had been supplied in response to the census questionnaires.

> [t]he language of the statute is clear and unambiguous. There is no basis for engrafting further exceptions upon those specified in the statute. One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests. Accordingly, Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse.

21 F.R.D. at 569-570 (footnote omitted). Congress, despite numerous amendments to the Census Act over the years, has never suggested that the courts in *St. Regis* and *Bethlehem Steel* erred in recognizing as absolutely privileged the raw census data held by the Census Bureau.

The district court below, like the district court in *Baldrige* v. *Shapiro*, nevertheless attempted to circumvent the Census Act's statutory privilege against disclosure of census information by directing that petitioners' employees who are given access to the address lists must be sworn to the same oath of secrecy required of Census Bureau personnel, and by specifically limiting unauthorized disclosure, publication and use of the material (Pet. Br. App. A-4 to A-5). As the court of appeals observed (Pet. Br. App. B-3), these provisions were a tacit acknowledgment by the district court that its order "constituted an

evasion of congressionally mandated confidentiality." If disclosure of the materials sought by petitioners does not violate 13 U.S.C. 9, then the oath requirement imposed by the district court is unnecessary and meaningless. See 13 U.S.C. 214. If disclosure of the materials does violate 13 U.S.C. 9, then release to petitioners is barred because the materials are privileged matter. In sum, as the court of appeals correctly concluded (Pet. Br. App. B-4), "in the face of the congressional prohibitions, the trial court [was without] authority to substitute its own techniques for protecting the confidentiality mandated by the statute."

C. The Privilege Protecting Census Bureau Address Lists From Disclosure Does Not Offend The Constitutional Guarantee of Equal Representation

Petitioners point to the district court's observation that access to the address lists is necessary to give petitioners "any meaningful ability to challenge the Bureau's determination" (Pet. Br. App. A-3), and they contend (Br. 12-16) that recognition of an absolute privilege denying disclosure of the address lists would impede attainment of an accurate census count, thus diluting the City of Denver's voting strength and denying to Denver's residents their constitutional right to equal representation. This argument is insubstantial.[19] In the first place, no con-

[19] Petitioners' brief in the court of appeals did not advance the contention that they are entitled to discovery in order to assure their constitutional right to equal representation. At oral argument below, however, petitioners' counsel touched upon this contention. The court of appeals apparently was adverting to petitioners' constitutional position when it stated that "no authority is given for the notion that Congress is constitutionally required to yield to such an argument" (Pet. Br. App. B-4).

stitutional question is posed when a privilege makes a litigant's proofs more difficult or impossible. Moreover, petitioners are incorrect when they assert that the address lists are indispensable to their challenge to census accuracy. Finally, petitioners err in claiming that the nondisclosure of the address lists will inevitably result in a deprivation of their right to equal representation.

1. The apparent premise of petitioners' argument is that whenever a plaintiff initiates a lawsuit based upon a constitutional claim, the defendant is barred from invoking an absolute evidentiary privilege if the privilege would effectively prevent the plaintiff from proving his case. This premise is fatally flawed. A privilege, by definition, deprives litigants and the court of relevant information and in that sense impedes the court's search for the truth—which is precisely why the law does not favor privileges. See *Trammel* v. *United States*, 445 U.S. 40, 50 (1980). However, where, as here, society determines by constitution, statute, or common law rule that absolute confidentiality is required because of public policy considerations more important than a court's search for truth in particular lawsuits, that ends the matter, and litigants must prove their cases, as well as they are able, without the privileged information. The "privilege will often impose a grievous hardship, for it may deprive parties * * * of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege." *United States* v. *Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952).[20] No reason

[20] See also *United States* v. *Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), cert. denied, No. 80-436 (Jan. 12, 1981): "[T]he concept of a trial as a search for the truth has always failed

is apparent why Judge Hand's common sense approach should not apply to all lawsuits, including petitioners', whether brought under the Constitution, a statute, or the common law.

Petitioners' suggestion that privileges be abrogated in "constitutional" suits [21] would mean, of course, that

---

of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence may be contained in a client's privileged admission to his attorney, or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination."

As Judge Hand recognized in *Coplon* (185 F.2d at 638), the government as plaintiff or prosecutor cannot always invoke its privilege without consequences to itself (*e.g.*, dismissal of its action). See *Roviaro* v. *United States*, 353 U.S. 53 (1957). But that is not so when the government is haled into court involuntarily as a defendant. In such cases, a plaintiff must prove his case without the privileged materials, and if he cannot do so, must face dismissal of his lawsuit. See *United States* v. *Reynolds*, *supra*; *Totten* v. *United States*, 92 U.S. 105 (1875); cf. *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc).

[21] The "constitutional" nature of petitioners' suit is open to question. It is true that petitioners seek judicial review of the accuracy of the census in part because an undercount of Denver's population count allegedly would dilute the voting power of Denver's residents. But, while this Court's cases clearly establish a constitutional right to equal representation so far as is practicable, this Court has rejected petitioners' view that the constitutional "one man, one vote" principle requires precision in the census count. See *Gaffney* v. *Cummings*, 412 U.S. 735, 745-747 (1973). Moreover, as we demonstrate below (pages 36-39, *infra*), the allocation of electoral districts within each state is the function of the state legislature, and there is no constitutional (or statutory) requirement that the legislature rely exclusively on census figures in the allocation process.

there could be no absolute privileges at all, and that in "constitutional" suits a party's privilege claim, even if traditionally considered absolute, always would be weighed against another party's litigation need for the privileged information. Thus, under petitioners' theory, the attorney-client or doctor-patient privileges and perhaps even the privilege against self incrimination presumably would evaporate when a plaintiff asserting a constitutional claim alleged an indispensable need for the privileged information. Petitioners' "constitutional" claim of entitlement to privileged Census Bureau material—for which petitioners fail to cite any authority—thus falls of its own weight and does not warrant this Court's serious attention.

2. Petitioners and amici are incorrect in repeatedly asserting that the Census Bureau's address lists are indispensable in order to mount a meaningful challenge to the accuracy of the census count for a particular locality, and that they are therefore entitled to the lists under a balancing approach (see note 17, *supra*). During the local review program, for example, the Census Bureau provided each local jurisdiction, including Denver, with housing unit totals and vacancy figures for each enumeration district within that jurisdiction (see J.A. 35, 47). There was nothing to prevent Denver from taking its own surveys in each of the enumeration districts or otherwise developing evidence controverting the Census Bureau's figures. Indeed, Denver did conduct its own surveys for approximately one-third of the city (J.A. 34-37), albeit in a manner that the Census Bureau considered defective (J.A. 69-71). Moreover, numerous other cities successfully demonstrated enumeration problems by analyzing the Bureau's preliminary aggregate data; as a result, the Bureau investigated

the problems and increased the population count (primarily as a result of the addition of housing units) where such action was warranted by the findings.

While it perhaps would be *easier* for local government officials such as petitioners to verify the Census Bureau's figures on an address-by-address basis through a cross-comparison with the Bureau's lists, mere convenience cannot be the decisive factor when, as here, local officials seek access to information whose confidentiality has been guaranteed by Congress. Therefore, even if this Court were inclined to permit breaches of census confidentiality based on indispensable litigation need, no disclosure may be ordered here because petitioners have made no showing that reviewing the Census Bureau's address lists is the only available method of demonstrating census inaccuracy.[22]

Furthermore, as we have already shown (page 21, *supra*), release of raw census data pursuant to civil discovery requests, regardless of the litigant's asserted need for the information, would greatly impair the ability of the Census Bureau to perform its constitutionally mandated task of conducting the decennial census. See *United States* v. *Bethlehem Steel*

---

[22] In any event, even if access to Census Bureau address lists were the only available method of checking census accuracy, petitioners have not shown that they are entitled to discovery of those lists in the present circumstances of this case. It is important to keep in mind that petitioners seek discovery of the Bureau's address lists in order to determine which housing units the Bureau counted as vacant as of April 1, 1980. If discovery is permitted, petitioners intend to attempt to show that the Bureau's vacancy figures are in error (see Pet. Br. 17). But it is no longer possible to conduct a reliable check of the vacancy status of housing units as of April 1, 1980; the results of any such effort would be highly suspect and error prone.

Corp., supra; United States v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,383 (S.D.N.Y. 1975).[23] If it became general public knowledge that local officials may (and do) exercise a legal right to demand and obtain access to raw census data in order to check its accuracy for "litigation" purposes, public confidence in the integrity of census data would be severely jeopardized. The resulting loss of public cooperation in the conduct of the census would far outweigh the alleged benefits that petitioners claim will result from recognizing a right of discovery for local officials.

3. Finally, there is no merit to petitioners' contention that according privileged status to the Census Bureau's address lists violates the constitutional principle of "one man, one vote" recognized in this Court's cases. See, *e.g.*, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

The only purpose expressed in the Constitution for the taking of the decennial census is the apportionment of representatives "among the several States according to their respective numbers." Fourteenth

---

[23] In *United States* v. *International Business Machines Corp.*, *supra*, the defendant in an antitrust action sought disclosure from the government of raw census data in the form of individual census returns submitted to the Census Bureau by suppliers of electronic data processing products and services. Without addressing the question whether the Census Act creates an absolute privilege exempting the documents from judicial process, the court concluded that the public interest in nondisclosure—to encourage the submission of accurate census data and to protect the privacy of individuals and businesses required by law to submit confidential information to the government—outweighed the asserted needs of the defendant for the information.

Amendment, Section 2. See *Carey* v. *Klutznick*, *supra*, 653 F.2d at 735-736. Petitioners do not claim that the State of Colorado would receive additional seats in Congress if the alleged undercount for Denver were corrected, and indeed, petitioners cannot reasonably make such a claim.[24] Because no constitutional or statutory provision requires the use of the census figures to determine apportionment of legislative or congressional districts within Colorado, petitioners cannot show that the failure to disclose confidential census information will deprive them of their right to equal representation.

Although the Census Bureau does provide in-state population totals to the states pursuant to 13 U.S.C. 141(c), the Bureau does not compel the states to use these in-state census totals in any particular manner. The states are free to adjust census figures for in-state redistricting, or indeed, to conduct their own in-state count, so long as there is a legitimate basis for the state system. As the Court observed in *Burns* v. *Richardson*, 384 U.S. 73, 91 (1966), a state legislative redistricting case, the Constitution "does not require the States to use total population figures derived from the federal census as the standard by which * * * substantial population equivalency is to be measured." Similarly, in *Kirkpatrick* v. *Preisler*, *supra*, 394 U.S. at 535, the Court held that states

---

[24] The Census Bureau has informed us that Colorado would need 508,089 persons more than the number transmitted by the President to Congress on January 7, 1981, in order to qualify for an additional seat in Congress (assuming that the census counts for the other states remained the same). Petitioners have never suggested that correction of the Census Bureau's alleged miscount in Denver would result in anything remotely resembling the addition of 500,000 people to the official census count for Denver.

may use non-census data for congressional redistricting in order to reflect population shifts between decennial census counts, so long as the findings on which the adjustments are based are "thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." Conversely, in *Mahan* v. *Howell*, 410 U.S. 315, 331-332 (1973), the Court concluded that a state legislature's reliance on census figures in apportioning certain legislative districts was impermissible under the particular circumstances. See also *Young* v. *Klutznick*, 652 F.2d 617, 624-625 (6th Cir. 1981); *Federation for American Immigration Reform* (*FAIR*) v. *Klutznick*, 486 F. Supp. 564, 570 n.11 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980), aff'd on remand, No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981).

Petitioners assert (Br. 14) that Colorado constitutional and statutory provisions require the use of census figures to apportion electoral districts within Colorado. But even if this were so, the features of a particular state's apportionment procedures, as established by state law, are not a sufficient basis for requiring federal officials to reveal confidential information protected from disclosure by federal statute. To hold otherwise would be to stand the Supremacy Clause on its head by permitting the states, in effect, to overrule federal law through enactment of contrary state legislation. In any event, the Colorado provisions upon which petitioners rely merely refer in general terms to the federal census, and nowhere purport to bar the state legislature from requiring adjustments to census data as it sees fit.[25] Thus, ap-

[25] The only provisions of the Colorado Constitution cited by petitioners that refer to the federal census merely tie the

plication of the privilege established by the Census Act's confidentiality provisions to bar discovery of raw census data does not violate petitioners' right to equal representation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN F. CORDES
Attorneys

SEPTEMBER 1981

---

timing of the Colorado reapportionment process to the completion of the federal census and to the availability of census data. Colo. Const. art. V, § 48(1)(a), (e). The cited statutory provisions simply define congressional and legislative districts in terms of "census tracts" and other census subdivisions. Colo. Rev. Stat. §§ 2-1-101 *et seq.*, 2-2-101 *et seq.* (1980).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 355114 625

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

REPLY BRIEF OF PETITIONERS

MAX P. ZALL
City Attorney

GEORGE J. CERRONE, JR.
Assistant City Attorney

353 City and County Building
Denver, Colorado 80202
(303) 575-2665

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	1
I. The Constitutional Right of One Man-One Vote Depends on an Accurate Enumeration of Persons By The Bureau	1
A. An inaccurate enumeration by the Bureau shall cause a violation of the one man-one vote right	2
B. The inherent difficulty of enumeration does not justify inaccurate enumeration where discrepancies are evident	4
C. Reapportionment within Colorado is as important as distribution of Congressional seats among the several states	6
II. The Effect Of The Bureau's Withholding Vacancy Data Shall Be To Hamper And Discourage Widespread Participation In Future Decennial Censuses	6
III. Vacancy Data Is Not Immune From Discovery In This Case	7
A. Evidentiary privileges are strictly construed	8
B. FOIA exemptions are inapposite to discovery disclosure	10
Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES

CASES:	Page
Baker v. *Carr*, 369 U.S. 186 (1962)	6
Burns v. *Richards*, 384 U.S. 73 (1964)	3
Firestone Tire and Rubber Co. v. *Coleman*, 432 F.Supp. 1359 (N.D. Ohio 1976)	10
Freeman v. *Seligson*, 405 F.2d 1348 (D.C. Cir. 1968)	9
Gaffney v. *Cummings*, 412 U.S. 735 (1973)	5
Jabara v. *Kelley*, 75 F.R.D. 475 (E.D. Mich. 1977)	9
Judith F. Carstens, et al. v. *Richard D. Lamm, as Governor of the State of Colorado, et al.*, U.S. Dist. Ct. (Colo.) 81-F-1713, filed October 1, 1981	3
Kerr v. *U.S. District Court For the Northern District of California*, 511 F.2d 192 (9th Cir. 1976), aff'd 426 U.S. 394 (1976)	11
NLRB v. *Harvey*, 349 F.2d 900 (4th Cir. 1965)	9
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	9
Pleasant Hill Bank v. *United States*, 58 F.R.D. 97 (W.D.Mo. 1973)	11
Schley v. *Pullman's Palace Car Co.*, 120 U.S. 575 (1887)	5
Seymour v. *Baraba*, 559 F.2d 806 (D.C. Cir. 1977)	8
St. Regis Paper Co. v. *United States* 368 U.S. 208 (1961)	9, 11
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958)	8
United States v. *Nixon*, 418 U.S. 683 (1974)	8
Verranzano Trading Corp. v. *United States*, 349 F.Supp. 1401 (Cust. Ct. 1972)	10

CONSTITUTIONS, STATUTES & RULES:

	Page
Colo. Const. Art. V. § 48	2
13 U.S.C. 141 (c)	2, 6
Freedom of Information Act	9, 10
Colo. Rev. Stat.	
2-1-101(1) (a)	3, A-1
2-1-101 (3) (b)	3, A-1
2-1-101 (5)	3, A-1
2-2-101	3, A-2
2-2-102 (1)	3, A-3
2-2-105 (3)	3, A-3
2-2-106 (3) & (4)	3, A-4
2-2-201	3, A-6
2-2-202 (1)	3, A-6
2-2-203 (3)	3, A-7
2-2-204 (3)	3, A-8
2-2-204 (4)	3, A-8
Fed.R.Civ.Proc.	9, 10

MISCELLANEOUS:

Demography and District; Constitutional Issues of the Federal Census, 94 Harv. L. Rev. (1981)	3
McCormick on Evidence (Cleary ed. 1972)	11
W. Prosser, *Law of Torts* (4th ed. 1971)	4

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

ARGUMENT

THE CONSTITUTIONAL RIGHT OF ONE MAN - ONE VOTE DEPENDS ON AN ACCURATE ENUMERATION OF PERSONS BY THE BUREAU

The deprivation of the right to equal representation in Congress and in the Colorado General Assembly for the people of the City and County of Denver shall be caused by the inaccurate enumeration of them by the Bureau and cannot be justified by the difficulty of

enumeration in light of evident and correctible discrepancies nor by the Bureau's disclaimers of responsibility.

A. An inaccurate enumeration by the Bureau shall cause a violation of the one man-one vote right.

The Bureau's certification to the State of Colorado of sub-state population figures as required by 13 U.S.C. 141 (c) without their having been corrected for persons residing in living units which were erroneously deemed to be vacant shall cause the districting of Congressional and State legislative seats to be improper. The Bureau denies this causal relationship and reasons that there is no requirement for the State of Colorado to use the Bureau's figures and that the Colorado State Legislature is an intervening cause of any resulting malapportionment. (Resp. Br. pp. 15, 36-37).

The State Legislature in reapportioning for Congressional representation and the State Commission[1] in reapportioning for State lelgislative representation shall and must, as a practical matter, use the Bureau's figures of the population of and within the State of Colorado. The Bureau's figures have been used in the past and are the bases for the current districts in the State of Colorado.[2] The various sections of Article 1. and 2. of Title II. of the Colorado Revised Statutes concerning apportionment are set

[1] The election districts for both the Senate and the House of Representatives of the Colorado General Assembly are determined by a bipartisan *ad hoc* commission composed of representatives from or appointed by all three branches of state government under Section 48 of Article V of the State Constitution.

forth, in pertinent part, in the appendix hereto. And just as with Colorado, in practice, most states use the Bureau's figures. See note, *Demography and District: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev., 841,861 (1981).

Further, by insisting that no one other than it conduct a census, the Bureau ensured that neither the State of Colorado nor the City and County of Denver had, prior to the 1980 Decennial Census, mechanisms and institutions necessary to create the data bases and information which would satisfy the requirements set forth by this Court in *Burns v. Richards*, 384 U.S. 73. (1964) for either updating or substituting the Bureau's figures for use in reapportionment.[3] And finally, the State legislature is already using the Bureau's figures in considering Congressional redistricting. See *Judiith F. Carstens, et al.*, v. *Richard D. Lamm, as governor of the State of Colorado, et al.*, U.S. Dist. Ct. (Colo.) 81-F-1713, filed October 1, 1981.[4]

---

[2] Colorado has depended upon and used federal census information including population counts. The census blocks, tracts and enumeration districts are used to describe Congressional and state legislative districts. 2-1-101(1) (a), 2-2-102(1) and 2-2-202(1) C.R.S. 1973. The federal census population figures are expressly recited and used in determining state legislative districts for state senators, 2-2-101 and 2-2-105(3) C.R.S. 1973, and for state representatives, 2-2-201 and 2-2-203(3) C.R.S. 1973. The federal population figures are used expressly for adjusting districts for omissions, 2-1-101(3) (b) C.R.S. 1973, and for annexations 2-1-101(5), 2-2-106(3), (4), and 2-2-204(3), (4) C.R.S. 1973.

---

[3] Modifications to the federal census necessarily require knowledge of that which is to be changed. Substitutions for the federal census necessarily require the wherewithal for conducting a complete enumeration. Denver has no substantial argument against the Bureau's location of city boundaries or living unit counts among other various aspects of a census. Adjustments to the Bureau's figures cannot be reasonably made without going into the details of their count - in this case - the living units which it deduced to be vacant, many of which, Denver contends, were occupied by people who were not counted in the 1980 Decennial Census.

The Bureau contends that the act of the Colorado State Legislature shall be the final and intervening cause of malapportionment. (Resp. Br. pp. 15, 37). However, that admittedly intervening cause shall be one which in ordinary experience is reasonably likely to be anticipated, and which the Bureau has reason to anticipate under these particular circumstances, making the Bureau's actions the proximate cause of the malapportionment and precluding the act of the State Legislature being a superseding intervening cause. See W. Prosser, *Law of Torts 238,272 (4th ed. 1971)*. Under either a "but for" theory or a "substantial factor" theory of causation, the errors of the Bureau shall be responsible for malapportionment because it will have failed to supply substate population figures free from an undercount of persons due to erroneously deduced vacant living units and the State Legislature and Commission could not then reapportion on the basis of those uncorrected figures. Prosser, *supra* at 240.

The inaccurate enumeration by the Bureau shall result in the malapportionment of the Congressional Representation allocated to Colorado and of the Colorado General Assembly, which in turn shall result in the deprivation of the rights of one man-one vote of the people of the City and County of Denver.

B. The inherent difficulties of enumeration do not justify inaccurate enumeration where discrepancies are evident.

The Bureau contends that accuracy in enumera-

[4] After the Governor vetoed three separate bills which attempted to redistrict Colorado's six Congressional seats, which were passed by the General Assembly, the plaintiffs are asking the U.S. District Court to intervene. From the Complaint, it is evident that the General Assembly intends to use the population figures from the Bureau in their reapportionment efforts.

tion is unimportant because population counts are inherently inaccurate and were recognized as such by this Court in *Gaffney v. Cummings*, 412 U.S. 735,745 (1973) (Resp. Br. pp. 15, 33).

Even though this Court has recognized that state legislative redistricting can be somewhat affected by other than pure numerical considerations, it has reaffirmed that the starting point in any analysis of the propriety of a reapportionment is numerical equality. This Court has reaffirmed that numerical considerations are still paramount, especially in Congressional redistricting.

In the trial court, Denver did present evidence of the inaccuracies of the Bureau, in more than one fashion.[5] In its brief, the Bureau attempts to rebut Denver's evidence and submits its own testimony which should have been available to it at the time of the hearing below. (Resp. Br. p. 7, n. 8, p. 35, n. 22). This Court has indicated that such proferred testimony will not be considered at the appellate stage. *Schley* v. *Pullman's Palace Car Co.*, 120 U.S. 575, 578 (1887).

The Bureau's contention that it cannot be criticized nor can its actions be reviewed or challenged because of the inherent difficulties of the task assigned to it simply forecloses any control over that process and over the process of reapportionment. This state of lawlessness proposed by the Bureau would undercut the main purpose of the census and the basis for reapportionment and cannot be constitutional.

---

[5] In addition to information from utility connections and use and the population figures of the Denver Regional Council of Governments, an independent state-chartered organization, the District Court accepted the results of Denver's survey of approximately one-third of the living units in the city; all of which showed the population of Denver greater than that stated by the Bureau and a vacancy rate of the living units in Denver much less than that deduced by the Bureau.

C. Reapportionment within Colorado is as important as the distribution of Congressional seats among the several states.

Denver has shown that the fact of the matter is that the population figures of the federal census are used by most of the states for reapportionment within those states. At least with respect to Congressional redistricting, it does make some sense to use the same information for reapportionment among the several states and within the states.

The cases which have reached this Court concern the distribution of legislative and Congressional representation within the various states. To argue that the task of assuring equal representation is complete once the seats of the House of Representatives are distributed among the several states is to ignore the lessons of *Baker* v. *Carr*, 369 U.S. 186 (1962), its progeny, and all other similar and related cases.

Notwithstanding the contention of the Bureau, the law which is its charter provides for it submitting sub-state figures to the states, the purpose of which could not be more obvious. 13 U.S.C. 141 (c).

The constitutional right of each person to equal representation cannot be assured and will be deprived without an accurate enumeration, as accurate as is at all possible, of persons by the Bureau.

THE EFFECT OF THE BUREAU WITHHOLDING VACANCY DATA SHALL BE TO HAMPER AND DISCOURAGE WIDESPREAD PARTICIPATION IN FUTURE DECENNIAL CENSUSES.

The Bureau contends that the goal and purpose of the confidentiality provisions of the Census Act is to

encourage widespread participation in the process of the census by all persons. (Resp. Br. pp. 16, 23). The Bureau further claims that Denver can proceed with their challenge and their cause without vacancy data from the Bureau; that Denver should simply use its own survey and make its own census enumeration. (Resp. Br. p. 34). These contentions and these claims are made by the Bureau in view of the fact that it requested that Denver and other local governments not conduct their own census concurrent with the Bureau so as to avoid confusion and encourage participation. And the Bureau cautions Denver in this Court that data which is collected later than that which it collected will be suspect. (Resp. Br. 35, n. 22).

The only practical recourse for Denver and others who now know of the Bureau's peccability and fallibilty is to conduct their own censuses concurrently with the Bureau in 1990. This course of action would certainly create more confusion for the people and discourage their participation in repeated and repetitious badgering by all levels of government and create in their minds disgust and dispair with those in the hands of whom they entrusted their government.

VACANCY DATA IS NOT IMMUNE FROM DISCOVERY IN THIS CASE

Denver submits that the confidentiality provisions of the Census Act provide only that (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents to the census; and (3) no one without statutory authority may read individual reports. Denver will use the lists of living units deduced by the Bureau to be vacant for precisely those statistical purposes for which that information is intended.

i.e., to ensure an accurate count of the population of the City and County of Denver in the 1980 Decennial Census.[6] Denver shall not, and does not ask that the Bureau, publish information which identifies respondents to the census; nor does Denver wish to read individual reports made to the Bureau by census respondents.[7]

A. Evidentiary previleges are strictly construed.

All privileges which prohibit or restrict a court from the full and complete search for truth are narrowly construed. The "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed...", *United States* v. *Nixon*, 418

[6] The Bureau points to *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) and to *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977) as authorities for broadly construing the confidentiality provisions of the Census Act. In each of those cases, the Bureau was not a party, but was simply the possessor of information which a party desired. In each of those cases, the party desiring the information wanted the information not for the purposes for which it was collected but for other purposes relevant to its litigation. In this case, the Bureau is a party, not simply a disinterested by-stander; and the information is requested and shall be used regarding the very functions, the very *raison d'etre*, of the Bureau, counting population. The rationale of *Bethlehem*, *supra* and *Seymour*, *supra*, is not applicable in this case.

[7] An assertion that, in order to assure that future census respondents will participate freely in the census with the knowledge that their responses shall be confidential, all information and all forms of information must be clothed in secrecy fails to defer to the express provisions of the Census Act and fails to recognize that future census respondents can and will distinguish between disclosure of their questionnaires and disclosure of data and information which is deduced from various sources by the Bureau. Census respondents can't fail to know that the information that they provide to the Bureau is now used for various statistical purposes; the Bureau doesn't simply collect it for the sake of collecting it. It does no service, either practically or in any analysis of the law, to lump together considerations regarding the individual questionnaires of respondents and information such as living units deduced by the Bureau to be vacant on Census Day.

U.S. 683, 710 (1974). This rule of law applies equally well to privileges created by the legislature through statutory enactment. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961); *Freeman* v. *Seligson*, 405 F.2d 1326,1348 (D.C.Cir. 1968).

The rationale for this suspicion of and aversion for privileges and the reticence in their application is clearly set forth by the U.S. Court of Appeals for the Fourth Circuit in *NLRB* v. *Harvey*, 349 F.2d 900, 907 (4th Cir. 1965):

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative, and its obstruction is plain and concrete.*** It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle.

This Court has provided guidance in narrowly construing governmental privileges to permit the broadest possible discovery otherwise allowable under the Federal Rules of Civil Procedure, *Jabara* v. Kelley, 75 F.R.D. 475, 480 (E.D.Mich. 1977), in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149, n. 16 (1975):

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's *need* in the context of the facts of his particular case; or on the *nature* of the case... However, it is not sensible to construe the [Freedom of Information] Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which a private party's claim is the most compelling. (Emphasis added.)

The need of Denver in this litigation for the information concerning dwelling units deduced to be vacant by the Bureau was explicitly found by the District Court

(Pet. Br. App. A-3). The nature of this case was characterized by the District Court as concerning the constitutional right to vote of the citizens of the City and County of Denver. (Pet. Br. App. A-3). And the right of Denver to the information is not comparable to any right of a member of the general public to such information under the Freedom of Information Act. (FOIA).

B. FOIA Exemptions are inapposite to discovery disclosure.

The disclosure requirements of the discovery provisions of the Federal Rules of Civil Procedure (F.R.C.P.) are more rigorous than the disclosure requirements of the FOIA.[8] *Firestone Tire and Rubber Co.* v. *Coleman*, 432 F.Supp. 1359, 1371 (N.D. Ohio 1976). The reason for the difference is grounded in the reason for the two different disclosure requirements. Where the FOIA was enacted to provide the general public with the right to obtain information from administrative agencies and agencies in the executive branch of government, Rule 26, *et seq.*, F.R.C.P., were promulgated to provide parties with discovery procedures for obtaining information during litigation. Specific exemptions to the disclosure requirements of FOIA cannot be transposed into or create judicial discovery privilege with respect to such exemptions. *Verranzano Trading Corp.* v. *United States*, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972).

> [T]he exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil

[8] The Bureau attempts to transfer the impact of the legislative histories relative to the FOIA to considerations for discovery rights of a party in litigation, yet fails to explain the positions of the executive and legislative branches in avoiding the express provisions for which it now longs.

> **discovery... They were intended only to permit withholding of certain types of information from the public generally.** *Kerr* **v.** *U.S. District Court For The Northern District of California*, **511 F.2d 192, 197-8 (9th Cir. 1976), aff'd 426 U.S. 394 (1976).**

See Also *Pleasant Hill Bank* **v.** *United States*, **58 F.R.D. 97, 100-1 (W.D.Mo. 1973);** *McCormick on Evidence*, **(Cleary ed. 1972) §108 at p. 233.**

This Court has already held that this statute, the Census Act, must be strictly construed with respect to the confidentiality provisions therein. *St. Regis Paper Co., supra*, **at 218, which is consistent with its approach to all impediments to the free search for truth, especially in litigation. While there is a statutory prohibition against allowing the disclosure of the actual completed questionnaires of census respondents, there is no such prohibition regarding a list of living units deduced by the Bureau to be vacant on Census Day, nor does the apparent purpose of the prohibition concerning individual reports imply[9] a need for such a judicial expansion of it. The considerations regarding the exemptions from the disclosure requirements of the FOIA are restricted to that statute, whose purpose is not the same as those of the discovery provisions of the Federal Rules of Civil Procedure.**

---

[9] **As in this case, this Court was asked to infer more than the Census Act provided in** *St. Regis Paper Co., supra*. **The reasons for this Court refusing to do so then are just as valid today and especially in this case.**

CONCLUSION

The task of the Bureau and the product of its work and the uses to which it is put are too important to allow escape from scrutiny. Such review demands that relevant and material facts be disclosed consistent with the strictures imposed by Congress. The Bureau must be ordered to disclose to Denver a list of living units deduced by the Bureau to be vacant on Census Day so that the count of the people of the City and County of Denver may be as accurate as possible.

Your Petitioners pray the Judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed and the cause remanded to the Court of Appeals with instructions to vacate its stay of the Order of the U.S. District Court for the District of Colorado.

Respectfully submitted,

MAX P. ZALL
City Attorney
GEORGE J. CERRONE, JR.
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202
(303) 575-2665
Counsel for Petitioners

OCTOBER, 1981

APPENDIX

SECTIONS OF 1973 COLORADO REVISED STATUTES CONCERNING CONGRESSIONAL AND STATE LEGISLATIVE DISTRICTS

2-1-101. Congressional districts. (1) For the election of representatives to congress, the state of Colorado is divided into five congressional districts as follows:

(a) The first congressional district shall consist of that part of the city and county of Denver which is not contained in the second and fifth congressional districts; census block number 103 in census tract number 119.52 in Jefferson county; census block number 901 in census tract number 120.51 in Jefferson county; those parts of census tracts numbered 49.50, 51.51, 53.50, and 69.51 which are in Arapahoe county; census tract number 69.52 in Arapahoe county; census block number 101 in census tract number 48.52 in Arapahoe county; that part of census block number 301 in census tract number 67.51 which is in Arapahoe county and which is bounded on the west by Quebec street, on the south by Belleview avenue, and on the northeast by the right-of-way of Interstate highway 25; and those parts of census blocks numbered 906 and 907 in census tract number 68.54 which are in Arapahoe county.

2-1-101. (3) (b) If the area is contiguous to two or more congressional districts, the area shall be attached to the district that has the least population according to the last preceding national census of the United States bureau of the census.

2-1-101. (5) (a) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a congressional district defined by this article and if the popula-

tion of the area annexed is one hundred seventy persons or less acccording to the 1970 federal census, the secretary of state shall detach the area annexed from the congressional district in which it is included pursuant to this article and shall attach such area to the adjacent congressional district in the county to which the area was annexed; except that, if such attachment would result in any area in one congressional district being wholly surrounded by area in another congressional district, no adjustment in congressional district boundaries shall be made. If the area annexed is adjacent to two or more congressional districts in the county to which it is annexed, the area shall be attached to the congressional district having the least population. The area so attached shall also be attached to any general election precinct adjacent to such area in the county to which the area was annexed.

(b) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a congressional district defined by this article and if the population of the annexed area is more than one hundred seventy persons according to the 1970 federal census, no adjustment in the boundaries of congressional districts shall be made, but the area annexed shall constitute a separate general election precinct.

2-2-101. Number of members of general assembly - election from districts. (1) The senate of the general assembly shall consist of thirty-five members and the house of representatives thereof shall consist of sixty-five members, with one member of the senate to be elected from each senatorial district and one member of the house of representatives to be elected from each representative district, as established in this part 1.

(2) The definition of areas to be included in each senatorial and representative district is by reference to

counties and to official census tracts, census divisions, census block groups, census blocks, and enumeration districts created by the United States bureau of the census to which fixed population counts have been assigned as of the year 1970.

2-2-102. Senatorial districts - number - composition. The senatorial districts are defined as follows:

(1) **District 1:** Census tracts numbered 1.01, 1.02, 3.01, 3.02, 3.03, 5.00, 6.00, 7.01, 7.02, 97.00, 104.01, 106.01, and 115.00 in the city and county of Denver; that part of census tract number 2.01 in the city and county of Denver which is not contained in district 2; census block groups numbered 4 and 5 in census tract number 2.02 in the city and county of Denver; census block groups numbered 3 and 4 and census blocks numbered 105, 106, 115, 201, 214, and 215 in census tract number 4.01 in the city and county of Denver; census block groups numbered 5, 6, and 7 and census blocks numbered 104, 105, 106, 107, 114, 115, 201, 202, 209, 210, 211, and 212 in census tract number 4.02 in the city and county of Denver; those parts of census tracts numbered 8 and 9.01 in the city and county of Denver, which are not contained in district 4; that part of census tract number 97.50, which is in the city and county of Denver, being a part of census block number 210; and census block group number 3 and census blocks numbered 901, 908, and 909 in census tract number 97.50, which block group and blocks are in Adams county.

2-2-105. Legislative declaration - findings of legislative fact. (1) The general assembly declares it to be necessary to meet the equal population requirements of section 46 of article V of the state constitution, and it has therefore been necessary, in some instances, to add part of one county to all or part of another county in forming senatorial districts under this part 1.

(2) The general assembly further declares that some senatorial districts are not comprised of areas whose boundaries are equidistant from the geographic center of the respective areas, but that variations therefrom were necessitated by population density and distribution, boundaries of enumeration districts and other identifiable census units of area, natural boundaries, and county lines in order to define senatorial districts having population as nearly equal as may be.

(3) Pursuant to the requirements of section 47 of article V of the state constitution, the senatorial districts established by this part 1 are based upon the following factors: (1) Equal population; (2) a minimum split of counties; and (3) compactness based upon geographic areas whose boundaries are as nearly equidistant from a center as possible, limited by variances caused by the shape of county boundary lines, census enumeration lines, natural boundaries, population density, and the need to retain compactness of adjacent districts.

Colorado's population as established by the 1970 federal census is 2,209,528. An average senatorial district is 63,129. The maximum deviation in excess of this average for a senatorial district as provided by this part 1 is 0.83 percent, while the smallest district is only 0.66 percent below average.

2-2-106. Attachments and detachments. (1) If any area of this state is omitted from the provisions of this part 1, inadvertently or by virtue of the complexities of the information supplied to the general assembly, the secretary of state, upon discovery of such omission, shall attach such area to the appropriate senatorial or representative district as follows:

(a) If the area is surrounded by a senatorial or representative district, the area shall be attached to such district;

(b) If the area is contiguous to two or more senatorial or representative districts, the area shall be attached to the district that has the least population according

to the last preceding national census of the United States bureau of the census.

(2) If any area of this state is included in two or more senatorial or representative districts established by this part 1, inadvertently or by virtue of the complexities of the information supplied to the general assembly, the secretary of state, upon discovery of such inclusion, shall detach such area from the senatorial or representative district or districts having the largest population and shall designate such area as being included in the senatorial or representative district having the least population; except that if such area is wholly surrounded by a senatorial or representative district and by inadvertence is also included in another senatorial or representative district, the secretary of state shall designate such area as included in the district wholly surrounding such area, regardless of population.

(3) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a senatorial district defined by this part 1, and if the population of the area annexed is one hundred seventy persons or less according to the 1970 federal census, the secretary of state shall detach the area annexed from the senatorial district in which it is included pursuant to this part 1 and shall attach such area to the adjacent senatorial district in the county to which the area was annexed; except that if such attachment would result in any area in one senatorial district being wholly surrounded by area in another senatorial district, no adjustment in senatorial district boundaries shall be made. If the area annexed is adjacent to two or more senatorial districts in the county to which it is annexed, the area shall be attached to the senatorial district having the least population. The area so attached shall also be attached to any general election precinct adjacent to

such area in the county to which the area was annexed.

(4) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a senatorial district defined by this part 1, and if the population of the annexed area is more than one hundred seventy persons according to the 1970 federal census, no adjustment in the boundaries of senatorial districts shall be made, but the area annexed shall constitute a separate general election precinct.

2-2-201. Number of members of general assembly - election from districts. (1) The house of representatives of the general assembly shall consist of sixty-five members, with one member of the house of representatives to be elected from each representative district, as established in this part 2.

(2) The definition of areas to be included in each representative district is by reference to counties and to official census tracts, census divisions, census block groups, census blocks, and enumeration districts created by the United States bureau of the census to which fixed population counts have been assigned as of the year 1970.

2-2-202. Representative districts - number - composition. The representative districts are defined as follows:

(1) **District 1:** Census tracts numbered 47.00, 48.01, 55.02, 55.03, 56.01, 119.02, and 120.01 in the city and county of Denver; that part of census tract number 120.51 which is in the city and county of Denver, being census block number 901 and a part of census block number 902; those parts of census tracts numbered 46.03 and 48.02 in the city and county of Denver which are not contained in district 2; that part of census tract number 46.01 in the city and county of Denver which is not contained in district 3; that part of census tract number 46.02 in the city and county of Denver which is

not contained in district 3; that part of census tract number 119.03 in the city and county of Denver which is not contained in district 28; census block number 101 in census tract number 119.53 which block is in the city and county of Denver; census block number 103 in census tract number 119.52 in Jefferson county; and that part of census tract number 120.02 which is in the city and county of Denver and is within five hundred feet of the southern boundary of the right-of-way of west Quincy avenue.

2-2-203. Legislative declaration - findings of legislative fact. (1) The general assembly declares it to be necessary to meet the equal population requirements of section 46 of article V of the state constitution in some instances to add part of one county to all or part of another county in forming representative districts under this part 2.

(2) The general assembly further declares that some representative districts are not comprised of areas whose boundaries are equidistant from the geographic center of the respective areas, but that variations therefrom were necessitated by population density and distribution, boundaries of enumeration districts and other identifiable census units of area, natural boundaries, and county lines in order to define representative districts having population as nearly equal as may be.

(3) Pursuant to the requirements of section 47 of article V of the state constitution, the representative districts established by this part 2 are based upon the following factors: (1) Equal population; (2) a minimum split of counties; and (3) compactness based upon geographic areas whose boundaries are as nearly equidistant from a center as possible, limited by variances caused by the shape of county boundary lines, census enumeration lines, natural boundaries, population density, and the need to retain compactness of adjacent districts.

Colorado's population as established by the 1970 federal census is 2,209,528. An average representative district is 33,993. The maximum deviation in excess of this average for a representative district as provided by this part 2 is 0.81 percent, while the smallest district is 1.02 percent below average.

2-2-204. (3) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a representative district defined by this part 2, and if the population of the area annexed is one hundred seventy persons or less according to the 1970 federal census, the secretary of state shall detach the area annexed from the representative district in which it is included pursuant to this part 2 and shall attach such area to the adjacent representative district in the county to which the area was annexed; except that if such attachment would result in any area in one representative district being wholly surrounded by area in another representative district, no adjustment in representative district boundaries shall be made. If the area annexed is adjacent to two or more representative districts in the county to which it is annexed, the area shall be attached to the representative district having the least population. The area so attached shall also be attached to any general election precinct adjacent to such area in the county to which the area was annexed.

2-2-204. (4) If any annexation occurring on or after May 1, 1972, changes a county boundary which constitutes any portion of the boundary of a representative district defined by this part 2, and if the population of the annexed area is more than one hundred seventy persons according to the 1970 federal census, no adjustment in the boundaries of representative districts shall be made, but the area annexed shall constitute a separate general election precinct.

Office-Supreme Court, U.S.
FILED
JUL 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. McNICHOLS, JR., et al.,

Petitioners,

vs.

MALCOLM BALDRIGE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Amici Curiae, Plaintiffs in MDL-444, In Re: 1980 Decennial Census Adjustment Litigation, In Support of the Petitioners.

JOHN E. FLAHERTY, JR.,
Law Department,
City of Philadelphia,
1580 Municipal Services Building,
Philadelphia, Pennsylvania 19107
(215) 686-5224

MALCOLM J. HALL,
Department of Law,
City of Atlanta,
2000 Fulton National Bank Building,
Atlanta, Georgia 30303
(404) 658-1150

Attorneys for Amici Curiae

Pennsylvania Appellate Printing Co. (215) 561-3877

TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 5

ARGUMENT:

I. The Constitutional Framework of the Census Challenges 6

A. The Legislative Apportionment Process Requires An Accurate Decennial Census . 6

B. This Court Has Never Hesitated to Correct Denials of the Constitutional Right to "One Man, One Vote" 8

II. The Master Address Registers Are Crucial to Preservation of the Right to Equal Legislative Representation 10

A. The MDL Plaintiffs Seek to Protect Their Right to "One Man, One Vote" 10

B. The Master Address Registers are the Key Documents in Assuring an Accurate Decennial Census 12

C. The Census Act Does Not Prohibit Disclosure of the Master Address Registers to Litigants Seeking an Accurate Count 14

D. The Case Law and Legislative History of §9 Limit the Scope of Confidentiality Under the Census Act 20

E. The Tenth Circuit Decision in *McNichols v. Baldrige* Ignores the Language of §9, the Legislative History, and the Relevant Case Law 23

TABLE OF CONTENTS

ARGUMENT:

F. The Master Address Registers are the Source of the Only Practical Remedy in the MDL Cases 27

III. Public Policy Requires Disclosure of the Master Address Registers 28

Conclusion 30

Appendix A—Master Address Register Form 1a

TABLE OF CITATIONS

CASES CITED: Page

Appeal of FTC Line of Business Report Litigation,
595 F.2d 685 (D.C. Cir. 1978) 22, 23

Association of Women in Science v. Califano,
566 F.2d 339 (D.C. Cir. 1977) 23

Baker v. Carr,
369 U.S. 186 (1962) 9

Baldrige v. Shapiro,
cert. granted, 47 U.S.L.W. 3806
(April 27, 1981) (No. 80-1436) 4, 26

Carey v. Klutznick,
No. 81-6042 (2d Cir. June 12, 1981). . 3, 4, 22, 25

Chapman v. Meier,
420 U.S. 1 (1975) 9

City of Philadelphia v. Klutznick,
503 F. Supp. 663 (E.D. Pa. 1980),
appeal argued, sub nom.
City of Philadelphia v. Baldrige,
No. 80-2785 (3d Cir. April 24, 1981) 4, 11

Ex Parte Seibold,
100 U.S. 371 (1880) 8

Ex Parte Yarborough,
110 U.S. 651 (1884) 8

Federal Open Market Commission v. Merrill,
442 U.S. 340 (1979) 26

Freeman v. Seligson,
405 F.2d 1326 (D.C. Cir. 1968) 18

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 8

In Re: 1980 Decennial Census Adjustment Litigation,
506 F. Supp. 648 (J.P.M.D.L. 1981)..... 1, 2

TABLE OF CITATIONS

CASES CITED:

Kerr v. United States District Court for the Northern District of California, 511 F.2d 192 (9th Cir. 1975), *aff'd.* 426 U.S. 394 (1976) 26

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 9

McNichols v. Baldrige, 644 F.2d 844 (10th Cir. 1981), *cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781) 1, 4, 13, 23, 26, 30

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 25, 26

Pierson v. United States, 428 F. Supp. 384 (D. Del. 1977) 26

Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967), *aff'd sub nom. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) 7

Reynolds v. Sims, 377 U.S. 533 (1964) 8, 9

Rosee v. Chicago Board of Trade, 36 F.R.D. 684 (N.D. Ill. 1965) 19

Roviaro v. United States, 353 U.S. 53 (1957) 23

St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) 17, 20, 27

Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977) 24, 25

TABLE OF CITATIONS

CASES CITED:

United States v. American Telephone & Telegraph Co.,
86 F.R.D. 603 (D.C.D.C. 1979) 26

United States v. Bethlehem Steel Corporation,
21 F.R.D. 568 (S.D.N.Y. 1958) 19-20

United States v. Classic,
313 U.S. 299 (1941) 8

United States v. Little,
321 F. Supp. 388 (D. Del. 1971) 20

United States v. Mosley,
238 U.S. 383 (1915) 8

Wells v. Rockefeller,
394 U.S. 542 (1969) 9

Wesberry v. Sanders,
376 U.S. 1 (1964) 5, 8, 9

Westinghouse Electric Corp. v. City of Burlington,
351 F.2d 762 (D.C. Cir. 1965) 23

Young v. Klutznick,
497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*,
No. 80-1751 (6th Cir. June 15, 1981)..... 3, 11

UNITED STATES CONSTITUTION CITED:

Article I, §2, cl. 3 ..... 6, 7, 16, 28

Amendment XIV, §2 7

UNITED STATES CODES CITED:

5 U.S.C. §552 (1977) 24, 26

7 U.S.C. §12 (1968) (amended 1978) 18

TABLE OF CONTENTS

UNITED STATES CODES CITED:

13 U.S.C. §8 (Supp. 1980) 15, 18, 19

13 U.S.C. §9 (Supp. 1980) 3, 14, 15, 16, 19, 22, 23, 25

13 U.S.C. §9(a)(1) (Supp. 1980)..... 15, 16, 24

13 U.S.C. §9(a)(2)(Supp. 1980)..... 16, 17

13 U.S.C. §9(a)(3)(Supp. 1980)..... 16, 20

13 U.S.C. §141 (Supp. 1980) 28

13 U.S.C. §302 (Supp. 1980) 17

RULES CITED:

Fed. R. Civ. P. 26 ..... 17, 18, 25, 26

Fed. R. Civ. P. 37(a)(2) 3

Supreme Court Rule 36 3

MISCELLANEOUS CITED:

"Confidentiality of the Census Reports": Hearings on H.R. 10569 and Similar Bills Before the Committee on Post Office and Civil Service of the House of Representatives, 87th Congress, 2d Session (1962). 21-22

Confidential Status of Census Reports, H.R. Rep. No. 2437, 87th Congress, 2d Session (1962) 21

Memorandum For Respondents in Response to City of Denver's Petition For Writ of Certiorari, *McNichols v. Baldrige, cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781) 4, 13

U.S. Bureau of Census, Census of Population and Housing: 1970 Evaluation and Research Program, PHC (E)-4, "Estimates of Coverage of Population of Sex, Role and Age: Demographic Analysis." (1973) 11

INTEREST OF AMICI CURIAE

On June 15, 1981, in a case challenging the accuracy of the 1980 decennial census, this Court granted certiorari on a petition by the City and County of Denver ("Denver") to consider the question of whether addresses of *vacant* housing units are protected from discovery by the Census Act. *McNichols v. Baldrige*, 644 F.2d 844 (10th Cir. 1981), *cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781). This Amicus Brief supports Denver's position that lists of vacant addresses are not protected from discovery in litigation challenging the conduct of the census.

The Amici in this case are thirty-eight states, counties, cities, and towns and two private plaintiffs who have sued the United States Census Bureau ("Bureau") in order to obtain an accurate count in the 1980 decennial census. Each of the Amici (hereinafter referred to as the "MDL plaintiffs") has brought a separate action in its local district court alleging that the Bureau failed to count all the people in the various governmental units represented by the MDL plaintiffs. Each MDL plaintiff must have the Master Address Registers for its particular geographic area in order to prove the Bureau's failure to count and in order to provide the local district court with a means of correcting the inaccurate count.

The MDL plaintiffs' joint interest in Denver's case arises out of the consolidation of the 1980 census cases by the Judicial Panel on Multidistrict Litigation. On January 16, 1981, all pending census cases were transferred to the District Court in Baltimore, Maryland for coordinated pretrial proceedings before Chief Judge Edward S. Northrop. *In Re: 1980 Decennial Census Adjustment*

Litigation, 506 F. Supp. 648 (J.P.M.D.L. 1981).[1] By order dated April 15, 1981, the MDL Court permitted

1. As of July 27, 1981, the following cases had been transferred to the MDL Court pursuant to 28 U.S.C. §1407: *Goodman v. Klutznick*, No. 81-70193 (E.D. Mich.); *Dona Ana County v. Klutznick*, Civ. No. 80-676 M. (D.N.M.); *Del Bello v. Klutznick*, No. 80 Civ. 7195 (S.D.N.Y.); *Board of Commissioners v. Klutznick*, No. C-1-81-029 (S.D. Ohio); *Overstreet v. Baldrige*, No. J-81-0007-Civ. (D. Alas.); *Cole v. Klutznick*, No. 81-0049-P.G. (D.P.R.); *Fahy v. Klutznick*, No. 81-617 (D.N.J.); *Sharrow v. Reagan*, No. 81 Civ. 1953 (S.D.N.Y.); *Connell v. Baldrige*, No. Civ. 81-5029-CV-SW (W.D. Mo.); *Meyers v. Baldrige*, No. B-8161-CA (E.D. Tex.); *Munzert v. Baldrige*, No. 80-5369 (S.D. Ill.); *Louisiana v. Klutznick*, No. 81-004-A (M.D. La.); *Clark v. Klutznick*, No. 80-4153 (D.N.J.); *City of Hobbs v. Klutznick*, No. 80-792 (D.N.M.); *Sullivan v. Klutznick*, No. A-80-397-Civ. (D. Alas.); *McLaughlin v. Klutznick*, No. 81-7 (D.Del.); *City of College Park v. Klutznick*, No. C-80-2252-A (N.D. Ga.); *City of East Point v. Klutznick*, No. C-80-2227-A (N.D. Ga.); *Hatcher v. Klutznick*, No. H-80-742 (N.D. Ind.); *Conway v. Klutznick*, No. 80-1549-C (3) (E.D. Mo.); *Krodinger v. Klutznick*, No. 80-1636-C (1) (E.D. Mo.); *Defino v. Klutznick*, No. 80-3896 (D.N.J.); *Gibson v. Klutznick*, No. 80-3438 (D.N.J.); *Jasienski v. Klutznick*, No. 80-4142 (D.N.J.); *New Mexico v. Klutznick*, No. 80-0726-C (D.N.M.); *Lewis v. Klutznick*, No. 80-862-Civ-5 (E.D.N.C.); *Drakeford v. Klutznick*, No. C-80-645D (M.D.N.C.); *Padilla v. Klutznick*, No. 80-2570 (D.P.R.); *City of Willecoochee v. Baldrige*, No. CV 581-05 (S.D. Ga.); *City of Chester v. Klutznick*, No. 80-3309 (E.D. Pa.); *Ferre v. Klutznick*, No. 80-2933 (S.D. Fla.); *City of Duluth v. Klutznick*, No. 5-80-150 (D. Minn.); *City of Atlanta v. Klutznick*, No. C-80-1685A (N.D. Ga.); *Massachusetts v. Klutznick*, No. 80-2232-Z (D. Mass.); *City of Owensboro v. Klutznick*, Civ. No. 80-0201-0(J) (W.D. Ky.); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980), *appeal dismissed*, No. 80-2375 (7th Cir. Dec. 31, 1980); *Holland v. Klutznick*, No. 80-73302 (E.D. Mich.).

In addition, two non-governmental entities which have filed suit have been transferred to the MDL Court: *Red Lake Band of Chippewa Indians v. Klutznick*, No. 6-80-644 (D. Minn.); *Spanish Coalition for Jobs v. Klutznick*, No. 80-C-2994 (N.D. Ill.). Since the MDL plaintiffs include two non-governmental plaintiffs, the MDL plaintiffs have obtained the consent of both petitioners and respondents to the filing of this Amicus Brief. These consents have been filed with the Clerk of this Court pursuant to Supreme Court Rule 36.

the MDL plaintiffs to begin "first wave" discovery in support of their claims that the Bureau had mismanaged the 1980 census in each of the jurisdictions represented by the MDL plaintiffs.

The MDL plaintiffs' discovery efforts have been stymied by the Bureau's claim that the Bureau's address lists, known as the Master Address Registers ("MARs"), are protected from discovery under the confidentiality provisions of the Census Act, 13 U.S.C. §9 (Supp. 1980). On May 19, 1981, the MDL plaintiffs, pursuant to *Rule* 37(a)(2) of the Federal Rules of Civil Procedure, moved to compel the Bureau to produce the MARs for each of the political subdivisions represented by the MDL plaintiffs. In their motion papers, the MDL plaintiffs outlined for the MDL Court why the MARs were needed:

> The plaintiff political subdivisions [MDL plaintiffs] require the address lists for use during discovery and at trial. Such uses include, *inter alia*, showing where the Bureau missed and/or failed to identify addresses for enumeration of people in the 1980 census, demonstrating patterns of inadequate counting among selected (e.g., minority areas) of political subdivisions, cross-examining local Bureau personnel about the use of the address lists in the field enumerations, and providing a data base for statistical and demographic experts to analyze biases and to document improper Bureau enumeration techniques.

¶8, MDL Plaintiffs' Motion to Compel Production of Master Address Registers and Related Documents, May 19, 1981.

(footnote 1 cont.)

Two census cases which had already been tried and which were on appeal as of January 16, 1981, were not consolidated: *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd* No. 80-1751 (6th Cir. June 15, 1981), and *Carey v. Klutznick*, 508 F. Supp. 20 (S.D.N.Y. 1980), *rev'd* No. 80-6042 (2d Cir. June 12, 1981).

Upon receipt of the MDL plaintiffs' motion and the Bureau's response to the motion, the MDL Court advised the parties that it would not rule on the discoverability of the MARs until the Supreme Court had ruled on the MARs confidentiality question raised in a Freedom of Information Act case (*Baldrige v. Shapiro, cert. granted*, 49 U.S.L.W. 3806 (April 27, 1981) (No. 80-1436)), and until various appellate courts had ruled on the MARs issue in a discovery context (*See McNichols v. Baldrige, supra; see also, City of Philadelphia v. Klutznick, appeal argued, sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981)).

This Amicus Brief supports Denver's position that the *vacant* address lists are discoverable. In addition, because vacant address lists are only one part of the MARs and because the related question of the discoverability of *occupied* address lists is not yet resolved, the MDL plaintiffs believe that it is appropriate for this Court, when considering the vacant address list question, to consider the occupied address list question as well.[2]

If the MARs are denied, the plaintiffs will be forced to try their cases without the documents needed to prove and to remedy the Bureau's errors. More importantly, if the MARs are denied, the constitutional rights of the

---

2. Because the Bureau takes the position that neither vacant address lists nor occupied address lists can be discovered in litigation, this Brief does not distinguish between vacant address lists and occupied address lists. *See* Memorandum for the Respondents in Response to Denver's Petition for a Writ of Certiorari, *McNichols v. Baldrige*, June, 1981, at 4-5: "The [Denver] case involves a discovery motion to compel production of *address* lists, not an FOIA request." (emphasis added) Accordingly, all references in this Brief to the "MARs" refer to *both* vacant and occupied address lists.

MDL plaintiffs will have been subordinated to the bureaucratic scheme which was originally established to protect, rather than infringe upon, the rights of citizens to equal legislative representation.

SUMMARY OF ARGUMENT

The 1980 census cases underscore the meaning of "one man, one vote." *Wesberry v. Sanders*, 376 U.S. 1 (1964). Each of the MDL plaintiffs has alleged that the 1980 decennial census for that plaintiff's state, county, city or town failed to count a significant percentage of the local population. These failures resulted directly from the Bureau's mismanagement of the local counting efforts. Each MDL plaintiff seeks a judicial order compelling the Bureau to perform an accurate count.

The MARs play an integral part in securing the constitutional rights of the MDL plaintiffs. The MARs are the key in providing an accurate census and, ultimately, in guaranteeing that the constitutional right to "one man, one vote" has practical meaning. If the MARs are inaccurate, the counting process becomes inaccurate, and the rights dependent on the census become hollow.

Through discovery, the MDL plaintiffs seek the MARs to prove and to correct the flawed 1980 census counts. On a specious claim of privilege, the Bureau has refused to produce the MARs, thus placing itself beyond meaningful judicial review. Neither the Constitution, the Congress, nor this Court has ever suggested that the mechanics of the counting process are beyond review or that the counting process itself is as inviolate as each citizen's right to "one man, one vote."

The Constitution requires that the decennial census serve the people. Where the Bureau's service is suspect, then the service must be reviewed and, if necessary,

corrected. Access to the MARs provides the means for such review and correction.

ARGUMENT

I. The Constitutional Framework of the Census Challenges

A. *The Legislative Apportionment Process Requires An Accurate Decennial Census.*

The taking of the census to determine the "whole number of persons" is an integral part of the "Great Compromise" by which the Constitutional Convention of 1787 forged the United States. The necessity for scrutinizing the counts in the 1980 census stems from the constitutional role accorded the census in assuring the integrity of the Compromise.

Article 1, Section 2 of the Constitution establishes the House of Representatives and embodies the Great Compromise. This provision requires apportionment of elected representatives by population as determined through the decennial census:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers*, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. *The actual Enumeration shall be made* within three years after the first Meeting of the Congress of the United States, and *within every subse-*

> *quent Term of ten Years*, in such Manner as they shall by Law direct.[3]

(Emphasis added).

The Constitution does not tolerate an inaccurate census. The obligation to apportion representatives with precision is indisputable. In 1832, while chairman of a Congressional committee analyzing the proper construction of Article 1, Section 2, Daniel Webster spoke eloquently of the duty imposed:

> The Constitution, therefore, must be understood not as enjoining an absolute relative equality—because that would be demanding an impossibility—but as requiring of Congress to make the apportionment of representatives among the several States, according to their respective numbers, *as near as may be*. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

S. Rep. No. 119, 22d Cong., 1st Sess. 4 (1832), *quoted in Preisler v. Secretary of State of Missouri*, 279 F. Supp. 952, 987, *affirmed sub nom. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (emphasis Daniel Webster's). It follows that the accuracy of the census must be evaluated against the same rigorous standards as are the other steps in the apportionment process, *i.e.*, it must be conducted so that

---

3. Section 2 of the Fourteenth Amendment modified this provision:

> Representatives shall be apportioned among the several States *according to their respective numbers, counting the whole number of persons in each State*, excluding Indians not taxed.

(Emphasis added).

"as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

Congress cannot apportion representatives "as near perfection as can be" where the Bureau provides population figures known to be deficient. Because the census count is the exclusive tool for determining legislative apportionment, every effort must be made to assure that the count truly accounts for all inhabitants "as near as may be." Thus, unless a court requires the Bureau to correct the counting errors, a curious situation will arise: congressional districts will be designed with "precise mathematical equality" based upon figures known to exclude thousands of citizens.

B. *This Court Has Never Hesitated to Correct Denials of the Constitutional Right to "One Man, One Vote."*

This Court has consistently ruled that actions of a government which impair a citizen's right to equal legislative representation are subject to judicial review. "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 526, 527 (1964).[4]

4. The *Reynolds* standard is based on a long line of decisions in which this Court has thwarted attempts to deny or restrict the right of suffrage. *See e.g., Ex parte Seibold*, 100 U.S. 371 (1880) (dilution of vote through ballot box stuffing held unconstitutional); *Ex parte Yarborough*, 110 U.S. 651, 663 (1884) (right to vote "free from force and fraud"); *United States v. Mosley*, 238 U.S. 383 (1915) (right to have vote counted); *United States v. Classic*, 313 U.S. 299 (1941) (alteration of ballots unconstitutional); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racially based gerrymandering unconstitutional).

The apportionment cases disclose this Court's concern with the more subtle forms of suffrage discrimination: voting rights "can be denied by a debasement or dilution of weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of franchise." *Reynolds*, 377 U.S. at 555. Thus, in *Baker v. Carr*, 369 U.S. 186, 207-08 (1962), this Court permitted judicial review of a statutory classification scheme which "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties." In *Wesberry v. Sanders*, 376 U.S. 1 (1964), congressional districting in Georgia was held unconstitutional after careful judicial scrutiny because the statute at issue contracted the value of some votes while it expanded that of others.

The debasement or dilution of votes cannot be excused because the government may articulate a rational basis for its conduct. The court must be satisfied that there has been a "good faith effort" to achieve *precision*. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). *See also*, *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) (As regards congressional districting, "population equality appears now to be the preeminent, if not the sole criterion, on which to adjudge constitutionality."). Moreover, once evidence is produced showing that precision has not been achieved, the defendant has the burden of proving that any disparities are "unavoidable despite a good faith effort." That burden is not met merely by characterizing the disparities as *de minimus*. In fact, this Court has held that population variations among congressional districts of 2% to 3% fail constitutional scrutiny. *Kirkpatrick*, 394 U.S. at 530-31. The principle at stake is fundamental:

> Equal representation for equal numbers of people is a principle designed to prevent debasement of

> voting power and diminution of access to elected representation. *Toleration of even small deviations detracts from these purposes.*

394 U.S. at 531 (emphasis added).

As is apparent from the forty census cases now before the MDL Court, the Bureau's mismanagement of the 1980 census resulted in imprecise measurements of population centers around the country. Under the "strict scrutiny" test of *Reynolds* and the percentage deviation standards of *Kirkpatrick*, any congressional redistricting scheme which simply ignores 2-3% of the population would be adjudged constitutionally defective. Yet precisely the same consequences flow from allowing the Bureau to ignore as many persons in the 1980 census. It is inconceivable that the right of citizens to equal representation—to a vote having full weight and value—is extinguishable merely because the offending instrumentality happens to be a federal agency rather than a state legislature. It is also inconceivable that the failures of a federal bureaucracy and the practical sources of relief can be hidden behind a specious claim of privilege.

II. The Master Address Registers Are Crucial to Preservation of the Right to Equal Legislative Representation

A. *The MDL Plaintiffs Seek to Protect Their Right to "One Man, One Vote."*

All the complaints in the census cases share a common theme: deprivation of the constitutional right to "one man, one vote." Each of the MDL cases allege—like the allegations in Denver—that the Bureau mismanaged the 1980 census in a particular state, county, city or town. As a result, those citizens who were not counted have been deprived of their constitutional right to equal

legislative representation. Even those who were counted have suffered a dilution of their vote, which again creates a deprivation of the constitutional right to equal legislative representation. Also, since dozens of federal programs distribute funds on the basis of population, the citizens living in states, counties, cities and towns where an inaccurate count was made have suffered and will continue to suffer a deprivation of their fair share of federal funds.

The individual complaints detail the Bureau's mismanagement of its local counting efforts.[5] For example,

5. The complaints generally raise two theories of improper Bureau action, a miscount theory and an undercount theory. Under the miscount theory, the MDL plaintiffs allege that the Bureau, at the local level, mismanaged the 1980 census by failing to implement techniques suitable for counting a local population. For example, in Boston the Bureau failed to use a method to count the large number of local students, a notoriously transient population. This failure, when combined with inadequate training of census-takers and poor management of local offices, led to a miscount of the local population in Boston. Only one miscount case has actually been tried, *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued, sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981).

The undercount theory raises the entirely separate argument that, no matter how well the 1980 census was managed locally, there would be an undercount of the population because of various sociological factors. The undercount claim is based on the Bureau's records from the 1960 and 1970 censuses, in which the Bureau admitted that substantial numbers of minority group members in large urban and poor rural areas were not counted. For example, in 1970 the Bureau found that 18% of black males between the ages of 25 and 44 were not counted. *See* U.S. Bureau of Census, Census of Population and Housing: 1970 Evaluation and Research Program, PHC (E)-4, "Estimates of Coverage of Population of Sex, Race, and Age: Demographic Analysis" (1973). The undercount theory seeks an adjustment to compensate for the undercount. Thus, an appropriate adjustment factor for black males between the ages of 25 and 44 might be 1.18 times the counted number. *See Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, No. 80-1751 (6th Cir. June 15, 1981).

in large urban areas such as Chicago and Atlanta, significant numbers of minority group members went uncounted because the Bureau was not equipped to deal with the rigors of counting in the inner cities. Other areas, such as Miami and New Mexico, complained that the Bureau had not counted all aliens. Still others, such as Boston and towns in North Carolina, complained that students were not counted.

The Bureau's local counting problems arose out of the Bureau's poor local management practices. Time and again, the complaints allege that the Bureau employed too few census-takers, poorly trained and supervised those who were hired, used misleading and inaccurate forms, stumbled on local racial and ethnic prejudices, changed internal management practices, and gave conflicting orders to various district offices—all of which led to inaccurate counts.

Through the discovery coordinated by the MDL Court, the MDL plaintiffs are now developing evidence of the Bureau's problems. However, in order to prove the effect of these failures—and, most importantly, in order to give the courts a means of correcting these failures—the MDL plaintiffs must have the Bureau's address lists, which show where the counts were taken and, by omission, where the counts were not taken.

B. ***The Master Address Registers are the Key Documents in Assuring an Accurate Decennial Census.***

The key documents in the Bureau's decennial counting efforts are the MARs because the MARs list all addresses in a counting district. If addresses did not appear on the MARs, then the people residing at the unlisted addresses were not counted.

According to the Bureau publications, the MARs were derived from commercial address lists, mailing lists and other public sources, checked for accuracy by Post Office workers and Bureau employees, and then compiled into "enumeration districts"[6] throughout the country. Census questionnaires[7] were mailed out by using the addresses on the MARs. Personal follow-up interviews were ordered if the MARs showed that questionnaires were not answered. Comments on the status of the count for each individual address in each enumeration district were recorded on the MARs.[8] A blank copy of the MARs form is shown in Appendix A of this Brief.

To obtain evidence of how the Bureau mismanaged the local counts, the MDL plaintiffs moved for production of the MARs for each complaining political subdivi-

---

6. An "enumeration district" is a term which the Bureau uses to describe a geographic area for census purposes. In a city every address is assigned to a "block," which is approximately the size of one city block. Census "blocks" are then aggregated to form "block groups," which are then aggregated to form "enumeration districts." "Enumeration districts" are, in turn, aggregated to form census "tracts." For example, in Philadelphia there are approximately 20,000 blocks, 2,276 enumeration districts, and 364 census tracts.

7. The census questionnaires are the forms which each citizen is required to complete. The questionnaires, in both a "short" and "long" form, provide specific information about name, age, race, sex, etc., for each respondent. The MDL plaintiffs do not seek access to the questionnaires.

8. The Tenth Circuit's decision in *McNichols v. Baldrige* refers to the updated master address registers as "follow-up address registers" ("FARs"), 664 F.2d at 845. For purposes of this Amicus Brief, the MARs and the FARs are identical since the issue before this Court is whether address lists, regardless of form, can be obtained from the Bureau. *Accord*, Memorandum for the Respondents in response to Denver's Petition for a Writ of Certiorari, *McNichols v. Baldrige, cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781); *see also*, footnote 9, *infra*.

sion.[9] With the MARs in hand, each MDL plaintiff will be able to provide evidence of the Bureau's failure to count in specific enumeration districts. Thus, the MARs will permit the plaintiffs to develop statistical studies to show bias in specific areas, to compare address lists made by the Bureau with address lists provided by the political subdivision's planning commission or local utilities, to show the magnitude of the Bureau's errors caused by the numerous manual additions to the MARs, to test the accuracy of Bureau claims that complete counts were made in every case, and to provide proof that, as told to the MDL plaintiff by the Bureau's census-takers, the MARs were in such disarray that it was impossible to use them effectively to count all people. In short, the MARs are crucial to each MDL plaintiffs' proof.

C. *The Census Act Does Not Prohibit Disclosure of the Master Address Registers to Litigants Seeking an Accurate Count.*

The Bureau argues that the MARs are protected from discovery by the confidentiality provisions of the Census Act, specifically 13 U.S.C. §9 (Supp. 1980). That position is untenable. Neither the language of Section 9 nor any other provision of the Census Act, expressly or by

---

9. The MDL plaintiffs' production request for the MARs refers to Production Requests 12 and 13 of Plaintiffs' First Request for Production of Documents, May 4, 1981, filed with the MDL Court in Baltimore:

> 12. The master address register ("MAR"), follow-up address register ("FAR") and/or any other address compilation for the political subdivision listing the address of each dwelling unit in the political subdivision.
>
> 13. The address list of the vacant dwelling/housing units enumerated in the 1980 census in the political subdivision.

fair implication, prohibits the disclosure of the MARs to litigants seeking an accurate count.

Section 9 reads as follows:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8[10] of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

---

10. Section 8 provides, in pertinent part, as follows:

> (a) The Secretary may, upon written request, furnish to any respondent, or to the heir, successor, or authorized agent of such respondent, authenticated transcripts or copies of reports (or portions thereof) containing information furnished by, or on behalf of, such respondent in connection with the surveys and census provided for in this title, upon payment of the actual or estimated cost of searching the records and furnishing such transcripts or copies.
>
> (b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) referred to in section 191(a) of this title, State or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work. In the case of nonprofit agencies or organizations, the Secretary may engage in joint statistical projects, the purpose of which are otherwise authorized by law, but determined by the Secretary.
>
> (c) In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.

13 U.S.C. §8 (Supp. 1980).

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purpose of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individuals or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. §9 (Supp. 1980).

Section 9(a)(1) does not prohibit disclosure in discovery. The MDL plaintiffs, in demanding accurate statistics for their states, counties, cities and towns, are seeking to "use" the MARs for the very "statistical purposes for which [they are] supplied," *i.e.*, to determine the "whole number of persons" residing in a particular political subdivision. The MDL plaintiffs have not asked the Bureau to use any information "furnished" by any person. Nor have the MDL plaintiffs made any demand upon any Bureau official to do anything for any purpose other than to obtain an accurate count. The MDL plaintiffs seek only to use information which the Bureau itself uses to locate those addresses where people reside. Disclosure of the MARs in litigation aimed at insuring the accuracy of the census is entirely consistent with the mandate of Article I, Section 2 of the Constitution and with §9(a)(1) of the Census Act.

Section 9(a)(2) does not prohibit "publication" of the MARs because the MARs do not give any information about the persons or entities which *"furnished"* the addresses contained on the lists. In fact, since the Bureau itself prepared the address lists from the sources other than census respondents, there is not even an issue of disclosing "data *furnished* by any particular establishment or individual." (emphasis added). Equally important, the MARs do not identify particular characteristics (*e.g.*, sex, race, age) which conceivably could allow "any particular establishment or individual . . . [to be] identified."[11] Similarly, the vacant address lists do not identify the persons (in this case, individual census-takers) who furnished the address of the vacancy. Of course, by definition, listing of a unit as vacant can give no indication of the characteristics of "non-existent" persons.

Assuming, *arguendo*, that the MARs are covered by §9(a)(2), their release to the plaintiffs, pursuant to Fed. R. Civ. P. 26, does not constitute "publication."[12] In fact, similar "publication" arguments advanced by federal agencies have been rejected by the courts. For exam-

---

11. To the extent that some names may appear on the MARs in their present condition or that the MARs contain personal information obtained from census respondents, the MDL plaintiffs have requested that such information be stricken from any documents which are produced. *See* MDL plaintiffs First Request for Production of Documents, May 4, 1981.

12. The Census Act recognizes that there is a distinction between "disclosure" and "publication." Section 302 of the Act, which concerns foreign trade and which was added in 1962 after the decision in *St. Regis Paper Company v. United States*, 368 U.S. 208 (1962), see Section II, D., *infra*, permits the Secretary to make rules ". . . for such confidentiality, *publication*, or *disclosure*, of information collected hereunder as he may deem necessary. . . ." 13 U.S.C. §302 (Supp. 1980) (emphasis added). Thus, even if "publication" were prohibited by §9(a)(2), then "disclosure," which the Census Act itself distinguished from "publication," would not be prohibited.

ple, in *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), the plaintiff trustee in bankruptcy sought discovery of documents held by the Secretary of Agriculture which reflected the transactions, trading patterns and names of persons who operated in the commodity exchange markets. The secretary claimed that the requested material was privileged under §8 of the Commodity Exchange Act (7 U.S.C. §12 (1968) (amended 1978)), which prohibits the "publication" of "data and information which would separately disclose the business transactions of any person and trade secrets of names and customers." The District of Columbia Circuit allowed discovery of the material, reasoning that:

> [L]imited *disclosure* in judicial proceedings, carefully curtailed by judicious use of protective orders authorized by Rule 30 [now Fed. R. Civ. P. 26], is not a *publishing* barred by the section. . . . *In the absence of a specific prohibition against disclosure in judicial proceedings*, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice. That kind of indication is not provided by §8, where both the language used and the statutory setting plainly reflect Congressional concern with widespread dissemination of information not otherwise available to the public, and not with *disclosure* in judicial proceedings.

405 F.2d at 1348-49 (footnote omitted) (emphasis added).

Section 9 specifically does not concern itself with disclosure in judicial proceedings where the information would be made available under a protective order for the express purpose of accomplishing the enumeration required by the statute. The MDL plaintiffs' claim for access to documents is, if anything, more compelling

than that asserted by the plaintiff in *Freeman*, since the MDL plaintiffs seek the information for a public rather than a private purpose and since the information does not provide the names of any individuals or describe any personal characteristics. *See also*, *Rosee v. Chicago Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965).

The language of *Freeman* also highlights another reason why §9 does not prohibit disclosure. The *Freeman* court noted that the Commodity Exchange Act did not contain "a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes." 405 F.2d at 1348. Here the Census Act contains no specific prohibition against disclosure of the MARs. Indeed, the *only* specific prohibition concerns the census questionnaires themselves:

> Copies of census reports which have been . . . retained [by census respondents] shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit or other judicial or administrative proceeding.

13 U.S.C. §9 (Supp. 1980). Conspicuous by its absence is any statutory prohibition against disclosure of information prepared by the Bureau for identifying those addresses to be contacted during the census.[13]

---

13. Equally revealing in the statutory scheme is §8 of the Census Act, *quoted in* footnote 10, *supra*. This section permits disclosure of "tabulations and other statistical materials which would not disclose the information reported by, or on behalf of, any *particular* respondent. . . ." (emphasis added). Thus, §8(b), like §9(a), protects the identity of individual census respondents. Further, §8(c) provides that information furnished in the "tabulations and statistical materials" cannot be used to the detriment of any respondent or other person to whom such information relates. . . ." 13 U.S.C. §8(c) (Supp. 1980). Again, the limits of the protection become clear: information furnished by the enumerated population is protected.

Finally, Section 9(a)(3) cannot block the MDL plaintiffs' request for the simple reason that the MDL plaintiffs do not seek "to examine the individual reports."

D. *The Case Law and Legislative History of §9 Limit the Scope of Confidentiality Under the Census Act.*

The only case in which this Court has dealt with Census Act privilege claims rejects the Bureau's statutory privilege argument. In *St. Regis Paper Company v. United States*, 368 U.S. 208 (1961), this Court held that a private corporation had to furnish to a separate federal investigating agency file copies of the corporation's report to the Bureau even though the Bureau had advised the public that the reports were protected. This Court specifically refutes the theory that §9 prohibits disclosure:

> As we have seen, *the prohibitions against disclosure contained in* §9 run only against the officials receiving such information and *do not purport to generally clothe census information with secrecy.* The Solicitor General admits that "literally construed" the restrictions of the statute go no further. But he insists that since the purpose of the statute is to encourage the free and full submission of statistical data to the Bureau, this can be accomplished only through the creation of a confidential relationship which will extend the privilege to the petitioner and like reporting companies. . . . *We fully realize the importance*

(footnote 13 cont.)

Accord, United States v. Bethlehem Steel Corporation, 21 F.R.D. 568, 570 (S.D.N.Y. 1958) (the "clear and unambiguous" purpose of the statute "was to protect those who complied with the command of the statute."); *United States v. Little*, 321 F. Supp. 388 (D. Del. 1971).

> *to the public of the submission of free and full reports to the Census Bureau, but we cannot rewrite the Census Act. . . .*

368 U.S. at 217-18 (emphasis added). Thus, the Census Act provided no confidentiality protection for a private corporation which furnished information to the Bureau even though the Bureau had told the corporation that its reports were privileged. By necessity, then, there can be no privilege where there is no submission of data by individuals, where there is no promise of privilege, and where the interest to be served is the public need of assurance that the census count is accurate.

The *St. Regis* decision led to legislation which gave the specific protection claimed by the Bureau. However, Congress expressly rejected a provision that would have prevented use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. This language was deleted at the explicit request of the Bureau:

> [The proposed amendment] is generally satisfactory, but to avoid any possibility that it might be construed to effect documents other than file copies of census reports, we recommend that [the proposed amendment] be modified to delete the words "any such information, reports, and other data" each place they occur in the bill and to substitute therefor the words "census reports."

Letter dated July 19, 1962, from Secretary of Commerce Hodges to the Chairman of the House Committee on Post Office and Civil Service, *contained in* "Confidential Status of Census Reports", H.R. Rep. N. 2437, 87th Cong., 2d Sess. (1962) at 5. *See also*, "Confidentiality of the Census Reports": Hearings on H.R. 10569 and Similar Bills Before the Committee on Post Office and Civil

Service of the House of Representatives, 87th Cong., 2d Sess. (1962). As a result of these hearings, the *only* statutory protection granted by Congress in response to the *St. Regis* case—and the only exclusion now applicable to judicial proceedings—is for *copies* of Census reports: "Copies of census reports . . . shall be immune from legal process. . . ." 13 U.S.C. §9 (Supp. 1980). This statutory protection simply does not apply to address lists compiled by the Bureau.[14]

Prior to the 1980 census cases, the only case after *St. Regis* dealing with §9 and the claim of immunity from process adopted the strict interpretation of this Court and rejected efforts to expand the protection of §9. In *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir. 1978), the District of Columbia Circuit analyzed the 1962 amendment and concluded that "Congress enacted a provision protecting only 'copies of census reports which have been retained.' " (footnote omitted). The Appeals Court also noted that Congress rejected the attempt to protect all census "information, reports and other data" because, to do so, would in the testimony of an administration witness "interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information." 595 F.2d at 699. Thus, the Court of Appeals limited the scope of §9 in order to permit the federal government to accomplish its regulatory tasks.

---

14. In *Carey v. Klutznick*, No. 81-6042 (2d Cir., June 12, 1981), Judge Stewart, concurring, slip opinion at 3, made the same analysis:

> Thus, the express protection of the statute is circumscribed: (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents; and (3) no one without statutory authority may pursue individual reports.

The *FTC Line of Business* case requires that the Bureau's privilege theory be rejected because the matter now before this Court arises from agencies of government carrying out their responsibility of assuring an accurate count. The federal agency's failure to perform its task of counting all the people has effectively forced the local government agencies—the MDL plaintiffs—to do the work of the Bureau. To deny the MDL plaintiffs access to the MARs would be to eviscerate the holding of *St. Regis*, the Congressional limitations contained in the 1962 amendment, and the subsequent appellate interpretation of §9.[15]

E. *The Tenth Circuit Decision in* McNichols v. Baldrige *Ignores the Language of §9, the Legislative History, and the Relevant Case Law.*

In upholding the Bureau's claim of statutory privilege, the Tenth Circuit in *McNichols v. Baldrige* ignored the specific language of §9, the legislative history of the section, and the relevant case law. As noted above, none of these sources support either the Bureau's arguments or the Tenth Circuit's decision.

---

15. Even if the MARs were privileged by statute, the MDL plaintiffs are still entitled to discovery of that information. Similar privileges have been termed "confidential report privileges" and have been held to be qualified rather than absolute. *Association for Women in Science v. Califano*, 566 F.2d 339, 343-44 (D.C. Cir. 1977). Where such a qualified privilege exists, there must be a measuring of "the need of litigants for information possessed by the Government [against] the need of the Government to foster the flow of information provided to it." *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965). The scope of such a privilege "is limited by its underlying purpose" and by "the fundamental requirements of fairness." *Roviaro v. United States*, 353 U.S. 53, 60-1 (1957). Here there can be little doubt that the MDL plaintiffs' public interest in equal legislative representation is superior to the Bureau's right to control access to information.

The only case cited by the Tenth Circuit, *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), is irrelevant to the discovery issue before this Court. In *Seymour* a private plaintiff, using the Freedom of Information Act, 5 U.S.C. §552 (1977) ("FOIA"), sought the names and addresses of all companies included within specific "standard industrial classifications" of the Bureau in order to pursue a private interest, namely, a treble damage antitrust suit. The District of Columbia Circuit held that such material was exempt from disclosure under 13 U.S.C. §9(a)(1).

In contrast to *Seymour*, Denver and the MDL plaintiffs, through the *discovery* rules, seek undifferentiated address lists, *i.e.*, lists which by their very nature do not disclose any characteristics of individuals. More importantly, the MDL plaintiffs seek the lists for a public rather than a private purpose. The lists are to be used to obtain an accurate enumeration of the "whole number of persons" within a political subdivision in keeping with the constitutional requisites of equal apportionment.

The public policy favoring nondisclosure of individual names in *Seymour*, protection of the census process from private use, mandates disclosure of the lists in this case. In *Seymour*, the Court suggested that disclosure of specific firms reporting to the Bureau could harm those businesses and thus make full compliance with the Bureau's reporting requests less certain. In the present case, no such harm is possible because the MARs do not provide any clue to the characteristics of any persons. Moreover, the disadvantgage is clearly associated with nondisclosure, since, without the lists, the inhabitants of the plaintiff political subdivisions will suffer dilution of their voting rights, as well as the inevitable increases in tax

burdens and reductions of municipal services brought on by the loss of revenue sharing funds.[16]

Even if FOIA prohibited disclosure of the MARs through a FOIA request, the broader inquiries permitted under the federal discovery rules, which are limited only by relevance, allow discovery of the MARs. As this Court has noted, the rules for access under FOIA do not control discovery under Fed. R. Civ. P. 26:

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case . . . . However, it is not sensible to construe [FOIA] to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 (1975). Thus, the fact that material may be privileged under FOIA does not mean that the same material is privileged in discovery:

> [T]he exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil discovery . . . . They were intended only to permit withholding of certain types of information from the public generally.

16. In *Carey v. Klutznick*, No. 81-6042 (2d Cir., June 12, 1981), the majority opinion adopted the view of the Tenth Circuit that the MARs are protected from disclosure by 13 U.S.C. §9 (Supp. 1980). The Second Circuit's only support for this conclusion is a quotation from the Tenth Circuit opinion and a footnote reference to *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977). As this section of the Brief demonstrates and as the Second Circuit's concurring opinion emphasized, the Tenth Circuit decision, relying exclusively on *Seymour*, is erroneous as a matter of law.

Kerr v. United States District Court for the Northern District of California, 511 F.2d 192, 197-98 (9th Cir. 1975), *aff'd* 426 U.S. 394 (1976). *Accord, Pierson v. United States*, 428 F. Supp. 384, 394 (D. Del. 1977) ("The argument apparently is that if the document would qualify for exemption under the Act, then it must be privileged . . . . This argument stands the law on its head."); *See also, United States v. American Telephone & Telegraph Company*, 86 F.R.D. 603, 635 (D.C. D.C. 1979) (material not obtainable under FOIA is not necessarily privileged in discovery.)[17]

The MARs are clearly relevant to the issues raised by the MDL plaintiffs. If a court is concerned about protecting relevant confidential information requested in discovery, then the protective order provisions of *Rule* 26 give whatever protection may be necessary. Thus, through use of protective orders, a court can allow a party, which is subject to court orders and sanctions, to have access to allegedly confidential material.

Here both Denver and the MDL plaintiffs are subject to court control and have stated their willingness to

17. While the MDL plaintiffs have filed this Amicus Brief in support of Denver in *McNichols v. Baldrige*, the MDL plaintiffs also support the position of the respondent Essex County, New Jersey in *Baldrige v. Shapiro*, 49 U.S.L.W. 3806 (April 27, 1981)(No. 80-1436), that the MARs are obtainable under FOIA. As in the Denver case, the Bureau's protection claim in *Shapiro* is premised upon a mistaken belief that §9 creates a statutory privilege and thus is exempt from disclosure under 5 U.S.C. §552(b)(3). Even assuming there were such a statutory privilege, the privilege is a qualified one which requires consideration of the litigants' need for the material. *See* footnote 15, *supra*. *See also, Federal Open Market Commission v. Merrill*, 442 U.S. 340, 362-63 (1979); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 140, 149, note 16 (1975) (in discovery, "litigant's need" relevant). Thus, even if this Court were to reject Essex County's arguments and to conclude that access to the MARs through FOIA is prohibited, discovery of the MARs under Fed. R. Civ. P. 26, with appropriate protective orders, is permissible through the subordination of interest test recognized in the qualified privilege cases.

prepare and abide by appropriate protective orders. By contrast, in *Seymour* there were no controls because, upon release of the information through FOIA, there would be no means of limiting the use of the information. The Tenth Circuit ignored this distinction.[18]

F. *The Master Address Registers are the Source of the Only Practical Remedy in the MDL Cases.*

Ultimately, upon conclusion of the MDL discovery, each MDL plaintiff will have to prove its case before a district court and then present the court with a means of obtaining an accurate count. The MARs are the instrument for obtaining such a remedy.

The mismanagement trials will disclose in detail the facts that the Bureau employed too few census-takers, failed to adequately train and supervise those who were hired, used misleading and inaccurate forms, failed to identify and deal with local racial and ethnic prejudices, changed its own internal management when it became clear that errors were occurring, and gave conflicting orders to different district offices. All of these, while telling of the Bureau's inadequacies, are preliminary, *i.e.*, they do not provide the needed remedy.

The MDL plaintiffs will have to show where people were missed and how the missing people can be counted.

---

18. The Tenth Circuit also ignored this Court's directive that privilege claims under the Census Act must be "strictly construed." *St. Regis Paper Company v. United States*, 368 U.S. at 218. The Tenth Circuit thus applied the wrong standard in reviewing the Denver case when it said "Both the history of the Census Act and the broad language of the confidentiality provisions of §9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a *liberal construction* of that immunity which would assure confidentiality." *McNichols*, 644 F.2d at 845. (emphasis added).

With the MARs in hand, the MDL plaintiffs will be able to provide the district court with evidence of failures to count in particular blocks of cities and counties. Most importantly, the MDL plaintiffs will be able to show the district courts in which enumeration districts the Bureau must be ordered to count again or to make other appropriate adjustments. Thus, as a practical matter, the MARs are the source of the only workable remedy in the MDL cases.

III. Public Policy Requires Disclosure of the Master Address Registers.

The preceeding sections of this Brief describe the apportionment process, the role of the census and the MARs in this process, and the MDL plaintiffs' critical need for the MARs. The preceeding sections also point out that, as a matter of statutory interpretation and case law precedent, there is no statutory privilege in §9. Yet, in analyzing the particular issue and the statutory claim of protection, it is important to bear in mind the public policy behind the Census Act.

Congress enacted the Census Act to assure that all the people were counted, as required by Article I, Section 2 of the Constitution. Section 141(a) of the Census Act embodies this directive to the Bureau: "The secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population. . . ." 13 U.S.C. §141(a) (Supp. 1980). Thus, the Bureau is charged with the task of counting the people.

The Bureau's task of counting is always subordinate to the constitutional mandate of equal legislative representation. Yet, by its claim of privilege, the Bureau has unilaterally decided that its role in the enumeration process is beyond public scrutiny. In simplest terms, the

Bureau has placed its ministerial functions above the level of each citizen's constitutional right to equal legislative representation. In the Bureau's eyes, its count is inviolate.

The Bureau's arrogance has no part in our constitutional system. The Constitution requires that the decennial census *serve* the people's right to elect representatives on an equal basis. Where the results of the service are inaccurate, then the results must be changed.

The MARs question before this Court is not founded on a balancing of interests—the people's right to equal legislative representation against the Bureau's right to control access to information. Rather, it rests upon a subordination of interests—the Bureau serves the people's right to equal suffrage. In the thicket of statutory history, judicial interpretation and bureaucratic anxiety raised by the census litigation, it must never be forgotten that the interests of the Bureau remain subordinate to the rights of the citizens.

CONCLUSION

For all the foregoing reasons, the MDL plaintiffs, as Amici Curiae, ask this Court to reverse the ruling of the Tenth Circuit Court of Appeals in *McNichols v. Baldrige*, and to hold that both vacant address lists and occupied address lists are not protected by the Census Act from discovery by litigants who are challenging the Bureau's count.

Respectfully submitted,

JOHN E. FLAHERTY, JR.,
MDL Plaintiffs' Lead Counsel,
Law Department,
City of Philadelphia,
1500 Municipal Services Building,
Philadelphia, Pennsylvania 19107
(215) 686-5224

MALCOLM J. HALL,
MDL Plaintiffs' Liaison Counsel,
Department of Law,
City of Atlanta,
2000 Fulton National Bank Building,
Atlanta, Georgia 30303
(404) 658-1150

*Counsel for Amici Curiae**

Of Counsel:
FRANK M. THOMAS, JR.,
FLORA B. WOLFE,
Law Department,
City of Philadelphia,
1500 Municipal Services Building,
Philadelphia, Pennsylvania 19107
(215) 686-5244

July 30, 1981

* Counsel wish to acknowledge the aid of John DiBernardi, Jr., a law clerk who assisted in the preparation of this Amicus Brief.

APPENDIX A

Block No. (1)	What is the FULL NAME (first, middle initial, last) of the person who owns or rents this living quarters? What is the EXACT MAILING ADDRESS used by this household (House No., street name, Lockbox No., or Route and Box No., post office name, and ZIP code)?				POST OFFICE			How would you describe the location of this place to someone who has never been here before? ENUMERATOR: If the mailing address is other than house number and street name, describe the location of the place.	Number of units at street address (6)	Type of form (7)	Serial number (box or map) (8)	Date quest. Page Rpnt. Checked in (9)	Number of persons (enter "0" if vacant, conv., rec.) (10)	Block number change (11)	Field C'k GC (12)	Remarks (If written + signature enter name or person in doubt of quest.-omissions) (13)
	Full name of householder (1a)	House No. (2)	Street name, Rural Route and Box No., or Lockbox No. (3)	Apartment No. or unit designation (4)	Name (5a)	State (5b)	ZIP code (5c)	(5d)								

Office Supreme Court, U.S.
FILED
AUG 4 1981
ALEXANDER L. STEVAS,

No. 80-1781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., *et al.*, *Petitioner,*

vs.

MALCOLM BALDRIGE,
SECRETARY OF COMMERCE, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal Defense
and Educational Fund
28 Geary St., 6th Floor
San Francisco, California 94108
(415) 981-5800

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

Table of Authorities.....ii

Interest of Amicus Curiae.....1

Argument:

1. *The Census Confidentiality Statutes Can and Should be Construed to Preserve the Important Concerns of Accuracy in Enumeration and Confidentiality of Respondent Information*..4

2. *Disclosure of Lists and Addresses to Denver, Subject to the Conditions Imposed by the District Court, Does Not Violate the Census Confidentiality Statutes*.....10

Conclusion.....16

TABLE OF AUTHORITIES

Cases

Carey v. Klutznick, __F. Supp. __ (S.D.N.Y. 1980), rev'd on other grounds __F.2d__ (2nd Cir. No. 81-6042, June 12, 1981).....2,7,10,11,12

Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980) (three-judge court), appeal dismissed 48 LW 3820 (1980), aff'd __F.2d__ (D.C. Cir. 1980), cert. denied 49 LW 3710 (1981).....8

Kirkpatrick v. Preisler, 394 U.S. 526 (1969).....5

McNichols v. Baldrige, 644 F.2d 844 (10th Cir. 1981).....3

St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).....14

Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977).....13

Shapiro v. Baldrige, __F.2d__ (3rd Cir. 1980), cert. granted No. 80-1436.....3,9,10

Spanish Coalition, et al., v. Baldrige, C.A. No. 80C2994 (N.D. Ill.)..2

Young v. Klutznick, __F. Supp.__ (E.D. Mich. 1980), rev'd on other grounds __F.2d__ (6th Cir. No. 80-1751, June 15, 1981).....2,7

Statutes and Constitutional Provisions

United States Constitution,
Article I, Section 2, Clause 3.....5

United States Constitution,
Fourteenth Amendment.....5

13 U.S.C. §8.....12
13 U.S.C. §8(b).....5,13
13 U.S.C. §8(c).....3,5,13

13 U.S.C. §9.....3,4,13,14,15
13 U.S.C. §9(a) 5,6,11,12,14
13 U.S.C. §9(b).....5

Pub. L. 94-521, 90 Stat. 2460 (1976)....13

No. 80-1781

IN THE SUPREME COURT OF

THE UNITED STATES

October Term 1980

WILLIAM H. McNICHOLS, JR., et al.,

Petitioners,

vs.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of Amicus Curiae

The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit corporation established to protect and extend the civil rights of Mexican Americans and other Hispanics in the

United States. A major goal of the organization since its inception has been to enforce the constitutional guarantee of equal representation for equal numbers of people. A basic mechanism for achieving this goal is to ensure that the Census Bureau has accurately assessed the number of Hispanics within the population.

MALDEF has challenged the accuracy of census counts in various parts of the country, alleging that racial minority and low-income populations, including Mexican Americans, were disproportionately undercounted in the 1980 census, thereby adversely affecting their political representation and access to certain grant programs.[1] In many instances, including the cases referenced in footnote 1, discovery of address lists and vacant housing unit lists is an essential tool enabling private persons and groups and local governments to challenge the Bureau's population figures. Because of the fundamental constitutional and statutory rights involved,

---

[1] Spanish Coalition, et al., v. Baldrige, C.A. No. 80C2994 (N.D. Ill.); Young v. Klutznick, __F.2d__ (6th Cir. No. 80-1751, June 15, 1981) (brief amicus curiae filed Jan. 10, 1981); Carey v. Klutznick, __F.2d__ (2nd Cir. No. 81-6042, June 12, 1981) (brief amicus curiae filed Feb. 12, 1981)

MALDEF urges that the Court uphold the district court's disclosure orders in McNichols v. Baldrige, and in Baldrige v. v. Shapiro, No. 80-1436.

MALDEF has also worked through its Census Awareness Project to promote the enumeration of all Hispanics in the United States on Census Day, including undocumented aliens. The importance of upholding strict confidentiality requirements for information furnished by individual respondents critically affects the accuracy of the census count of Hispanics, particularly in those communities where undocumented aliens reside. The Census Bureau is under the statutory obligation to assure respondents that their identities will not be disclosed and that the information they furnish will not be used against them. 13 U.S.C. §8(c). Undocumented aliens will be even less likely to cooperate with the census unless the prohibitions of 13 U.S.C. §9 against disclosure of individual identifying data are strictly enforced.

The Bureau should be permitted to disclose address lists and vacant unit lists, but only when the parties seeking

disclosure are involved in formal efforts to challenge statistical population data published by the Bureau and only under strictly tailored protective orders which effectively prevent both disclosure of individual identifying material and unauthorized use or publication of any material. The use of adequate protective orders will uphold the confidentiality provisions of §9 as well as allow meaningful opportunity for the general population to assure an accurate census count. Disclosure of address lists and vacant unit lists under these conditions would serve the two interests of Hispanics identified in this Statement, and is fully consistent with the Census statutes.

ARGUMENT

1. *The Census Confidentiality Statutes Can and Should be Construed to Preserve the Important Concerns of Accuracy in Enumeration and Confidentiality of Respondent Information.*

The controversy presented by this case, which arose due to alleged inadequacy of the 1980 census enumeration in Denver, implicates two fundamental concerns. First, allocation of Congressional representation according to the de-

cennial census of "the whole number of persons", required by Art. 1, Section 2, Clause 3 of the Constitution as amended by the Fourteenth Amendment, and apportionment within the states under this Court's one man-one vote standard, Kirkpatrick v. Preisler, 394 U.S. 526 (1969), require the most accurate possible census enumeration. Accuracy in this context connotes completeness. Second, the need for voluntary private cooperation to enhance accuracy requires a guarantee of confidentiality for individual information supplied by census respondents. That confidentiality interest is reflected in census statutes, 13 U.S.C. §§ 8(b), (c), 9(a), (b).

These two concerns are in tension, if not in conflict, in the circumstances of this case. Petitioner McNichols seeks access, subject to certain precautions to prevent improper disclosures, to address lists of vacant housing units compiled by Respondents as part of the census. Denver needs this information in order to challenge an alleged undercount of thousands of persons, apparently resulting from the Bureau's erroneous determination that many living units were vacant when in fact they

were occupied. Petitioners' access to address lists would clearly serve the interest of accuracy and completeness. Respondents have refused Denver access on the basis of the census confidentiality provisions, 13 U.S.C. §9(a). Adherence to the rule of confidentiality of census information will generally serve not only the statutory command, but also the voluntary cooperation necessary for successful enumeration of the population. The Court is asked in this case to identity the predominant interest, consistent with the statutes, or to interpret the statute in a manner that would reconcile both concerns.

Mexican Americans and other Hispanics have a particular stake in how the Court's resolution will affect both concerns identified above. If the 1980 census enumeration remains incomplete, the consequences of the undercount will not be evenly spread among all groups. Members of racial and ethnic minority groups, persons of low income, inner-city residents, and migrants (who are disproportionately minorities) were undercounted to a far greater degree than the general population. Their political representation and share of

economic benefits are reduced accordingly. The two district courts that have reached the merits of undercount litigation on an evidentiary record have both so found, in strong terms. Carey v. Klutznick, __F. Supp.__(S.D.N.Y. No. 80 Civ. 4550, 1980), rev'd on other grounds, __F.2d__(2nd Cir. No. 81-6042, June 12, 1981); Young v. Klutznick, __F. Supp.__(E.D. Mich. No. 80-71330, 1980), rev'd on other grounds, __F.2d__(6th Cir. No. 80-1751, June 15, 1981). Both of the cited cases were brought by cities (New York and Detroit) and a state (New York) with large minority populations. Denver, involved here, is another area of concentrated black and Hispanic population. The substantiality of the undercount issue underlying Respondent's demand for discovery of address lists is further illustrated by the pendency of "half a hundred" suits challenging the accuracy of the 1980 census, see Carey v. Klutznick, supra, __F.2d__, Slip Op. at p. 3722 n. 23, cases listed id. at p. 3718 n. 10. In many of these suits, plaintiffs have specifically alleged that the census differentially undercounted Hispanics. The Bureau has refused to make adjustments for

minority underenumeration, although it acknowledges the existence of that phenomenon. Thus, if Hispanics are to be accurately counted and not disproportionately undercounted, the courts must provide effective means for dissatisfied local governments or citizen groups to challenge census figures.

Mexican Americans and other Hispanics likewise have special reason to seek assurances of confidentiality for personal census information. Like other predominantly lower-income and minority persons, many Hisapnics are suspicious of government agencies and shun official involvements. While it is in their interest as a group to participate fully and be counted, many individuals do not believe that their own best interest lies in this direction. This reluctance is greatly exacerbated in the case of undocumented aliens and other persons who may live or work in proximity to aliens, from whom they are often not easily distinguishable.[2] The fear that the Bureau

---

[2]The census is required to count all residents without regard to their citizenship, including undocumented residents. Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564,

might disclose personal identifying information about undocumented aliens, triggering investigative or administrative actions by federal or other law enforcement officials, is a powerful disincentive to responsive cooperation with the census in some Hispanic communities.

Amicus believes these two apparently contrary interests can and, indeed, must be accommodated under the controlling census statutes. Those statutes neither require nor permit, a blanket prohibition on all disclosure of all census information, as Respondents urge, and as the Court of Appeals for the Tenth Circuit held in this case. See, Shapiro v. Baldrige, __F. Supp.__ (D.N.J. 1980), aff'd __F.2d__(3rd Cir. 1980), cert. granted No. 80-1436 (upholding disclosure of address lists). Neither do the statutes allow any disclosure of information that is personal in nature or might permit individual identifications, nor any disclosure of information for other than "sta-

---

576-577 (D. D.C. 1980) (three-judge court) (dicta) appeal dismissed 447 U.S. 916 (1980), aff'd __F.2d __(D.C. Cir. 1980), cert denied 49 LW 3710 (1981).

tistical purposes". See, p. 11, infra. These limitations, together with the conditions imposed by the district courts in this case and in Shapiro v. Baldrige, supra, faithfully carry out the mandate of the census statutes' confidentiality provisions and adequately protect the public interest in confidentiality of individual census information.

2. *Disclosure of Lists and Addresses to Denver, Subject to the Conditions Imposed by the District Court, Does Not Violate the Census Confidentiality Statutes.*

Amicus will not expand in great detail on the parties' arguments. While second to none in our commitment to the confidentiality of identifying respondent information, see p. 8 , supra, we submit that the census confidentiality statutes do not prohibit disclosure of the address lists sought by Denver in the manner ordered by the district court. We believe the correct analysis and application of the statutes to be that of Judge Stewart in his concurring opinion in Carey v. Klutznick, supra, Slip Op. pp. 3728-3740. Judge Stewart correctly criticizes the statutory interpretation of the Second Circuit panel

majority in Carey, the same interpretation adopted by the Tenth Circuit and espoused by Petitioner, as overbroad.

As Judge Stewart notes in his opinion, the limitation on use of census data by 13 U.S.C. §9(a)(1) to "statistical purposes" does not prohibit access to address lists used to produce or verify statistical summaries, e.g., population counts, where those lists contain no information from or about identifiable, individual census respondents. The purpose of such disclosure can only by statistical. Slip Op. at 3734. Likewise, 13 U.S.C. §9(a)(2), prohibiting disclosure of information from which data supplied census respondents can be (individually) identified, is no bar to release of address lists from which no information from or about any individual or establishment with a privacy or confidentiality interest could be discerned. And while 13 U.S.C. §9(a)(3) prohibits unauthorized persons from inspecting "individual reports", address lists are not such reports. Slip Op. at p. 3731. This "limitation of confidentiality to information furnished to the Bureau by census respondents", Slip Op. at p. 3733, constitutes a "sub-

stantial, but finite, confidentiality", id. at 3734. It strikes the correct balance between the competing interests of ascertainment and use of accurate statistical data, and confidentiality for individual census reports and identifying information. The key factors are (1) the source of the information sought; as Judge Stewart wrote, "information 'gathered, categorized and assembled' for the Bureau, but not reported by census respondents, [does not] acquire statutory protection," Slip Op. at p. 3735, and (2) the inability of users of the information to discern identifying information about individual respondents, id. at pp. 3738-3739.

This balanced reading of the confidentiality provision is not merely expedient social policy, but is mandated by the entire statutory scheme and its Congressional history. 13 U.S.C. §8, authorizing disclosure of certain data subject to §9a, reflects the broad, but not unlimited sweep of the confidentiality principle, in its permission for release of "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent"

(emphasis supplied), 13 U.S.C. §8(b); and in its injunction against use of census data "to the detriment of any respondent or other person to whom such information relates" (emphasis supplied), 13 U.S.C. §8(c).

The underscored language of Section 8 was recently added as part of the 1976 Amendment, Pub. L. 94-521, 90 Stat. 2460. It re-emphasizes concerns expressed in Congress in the course of enacting the 1962 amendment and earlier statements of Congressional intent to protect respondents' confidentiality. See opinion of Judge Stewart, supra, Slip Op. at pp. 3731-3733.

The Court of Appeals gave an extremely broad sweep to the Section 9 prohibitions. Without careful analysis, it concluded, based on Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977)[3], that the undeniably broad language of Section 9 is necessarily all-encompassing. That reading of Section

[3] Seymour states, but does not depend on, the extremely broad reading of Section 9 adopted below. On its facts, Seymour illustrates the need to acknowledge that Section 9 does insulate information from or about respondents; it was a direct attempt by an anti-trust lawyer to obtain names and addresses of potential class members. At the same

9(a) flies in the fact of this Court's observation in St. Regis Paper Co. v. United States, 368 U.S. 208, 217-218 (1961) that "the prohibitions against disclosure contained in §9...do not purport to generally clothe census information with secrecy." In acting to overrule the specific result in St. Regis by amending Section 9(a), Congress in 1962 legislated only narrowly in regard to the confidentiality of respondent-retained individual census reports: it did not create a general secrecy law and manifested its opposition to such a provision. See discussion in Judge Stewart's opinion, supra, Slip Op. at pp. 3731-3732.

The Court of Appeals refused to sanction the order to disclose lists of vacant housing units on the assumption that such information "was disclosed by census respondents", 644 F.2d at 846, although such lists clearly do not identify them. On the contrary, it would appear that vacancy information is produced by a lack of response to census questionnaires or by in-

---

time, it does not, for that reason, support rejection of purely statistical data subject to safeguards against escape of any identifying material.

spection by Bureau personnel.[4] The thrust of the Tenth Circuit's decision to give sweeping scope to Section 9 appears to be an effort, in service of what the Court perceives as sound policy, "to keep [Government's] promises to its citizens in a time of citizen distrust of government," 644 F.2d at 845. In addition to providing inadequate basis for judicial expansion of statutorily-defined limits, the Tenth Circuit identified only one of the two strong policies at stake.

The district court's order was carefully circumscribed to require production only of addresses which were believed vacant, and to restrict access to and use of even that data to the greatest degree consistent with providing Denver the information it needs to challenge the Bureau's palpably inflated estimate of vacancy rates.[5] That order was appropriate.

---

[4] See Brief of Petitioners, p. 18.

[5] See Brief of Petitioners, pp. 7-10. The district court's precautionary measures, which should be acknowledged as a necessary element of any disclosure orders, include the following:

(1) All names and other identifying referercces must be deleted;

(2) All those who have access to address lists must be sworn to the same oath of secrecy

Conclusion

In reversing the judgment of the Tenth Circuit, the Court should strongly reaffirm the cardinal importance of protecting the confidentiality of census information from or about individual respondents, while assuring limited access to other information gathered by the Bureau, insofar as necessary to assure the accuracy of the population count.

DATED: August 4, 1981.

Respectfully submitted,

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal Defense and Educational Fund, Inc.

Attorneys for Amicus Curiae MALDEF

---

as are personnel of the Bureau, and subjected to contempt orders;

(3) The information obtained must be used only to ascertain correct population figures (we would add, in formal proceedings such as the Bureau's Local Review Process or in litigation).

(Joint Appendix, pp. 116-117)